

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED FEB 13 1956

No. 13,007

DISTRICT OF COLUMBIA, Petitioner,

Joseph W. Stewart
CLERK

v.

THE WASHINGTON POST COMPANY,
Respondent.

No. 13,008

DISTRICT OF COLUMBIA, Petitioner,

v.

WASHINGTON TIMES-HERALD, INC.,
Respondent.

No. 13,009

DISTRICT OF COLUMBIA, Petitioner,

v.

THE WASHINGTON POST COMPANY,
Respondent.

ON PETITIONS FOR REVIEW OF DECISIONS OF THE DISTRICT
OF COLUMBIA TAX COURT

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DISTRICT OF COLUMBIA TAX COURT

FILED
APR 5 1955
District of Columbia
Tax Court

THE WASHINGTON POST COMPANY,	)	
	)	
Petitioner	)	
	)	
v.	)	Docket No. 1494
	)	
DISTRICT OF COLUMBIA,	)	
	)	
Respondent	)	

PETITION

The Petitioner, The Washington Post Company, hereby appeals from a denial of claims for refund of use taxes paid by it under the provisions of the District of Columbia Use Tax Act, Sec. 47-2701, et seq., D. C. Code (1951 ed.), and in support thereof alleges as follows:

1. This Tax Court has jurisdiction under the provisions of Secs. 47-2617, 47-2618, 47-2713, 47-2402 and 47-2413(d) and (e) of the D. C. Code (1951 ed.) in that without any determination of a deficiency under Sec. 47-2616 of the D. C. Code (1951 ed.) Petitioner has paid use taxes which were erroneously or illegally collected and within one year after such payments filed claims for refund of such use taxes, which refund claims were rejected on March 11, 1955.

2. Petitioner is a corporation organized under the laws of the State of Delaware with its principal office at 1515 L Street, N. W., Washington, D. C.

3. The taxes in controversy are use taxes for the period from August 1, 1949, through March 31, 1954, in a total amount of \$3,482.34 paid by Petitioner in connection with contracts by which it purchased
2 from Syndicates the right to reproduce drawings of comic strips and other features made by artists. Petitioner also paid interest in the amount of \$165.24 on such of said use taxes as were paid by it for the period from August 1, 1949, through May 31, 1952, and such interest is also in controversy.

4. Said use taxes were paid by Petitioner on the dates hereinafter mentioned, in the amounts hereinafter specified, with interest as hereinafter specified, and thereafter, on the dates hereinafter specified, Petitioner filed claims for refund of the amounts so paid, which claims for refund were denied on the dates hereinafter specified.

<u>Period Covered</u>	<u>Amount Paid</u>		<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
<u>Tax</u>	<u>Interest</u>				
8/1/49 - 5/31/50	\$610.24	\$85.24	7/3/52	6/30/53	3/11/55
6/1/50 - 5/31/51	730.93	61.63	7/3/52	6/30/53	3/11/55

<u>Period Covered</u>	<u>Amount Paid</u> <u>Tax</u> <u>Interest</u>	<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
6/1/51 - 5/31/52	751.23 18.37	7/3/52	6/30/53	3/11/55
6/1/52 - 6/30/52	66.81	7/21/52	6/30/53	3/11/55
7/1/52 - 7/31/52	62.92	8/19/52	6/30/53	3/11/55
8/1/52 - 8/31/52	62.80	9/19/52	6/30/53	3/11/55
9/1/52 - 9/30/52	63.47	10/20/52	6/30/53	3/11/55
10/1/52 - 10/31/52	61.46	11/21/52	6/30/53	3/11/55
3 11/1/52 - 11/30/52	60.09	12/19/52	6/30/53	3/11/55
12/1/52 - 12/31/52	64.59	1/19/53	6/30/53	3/11/55
1/1/53 - 1/31/53	59.66	2/20/53	6/30/53	3/11/55
2/1/53 - 2/28/53	54.94	3/20/53	6/30/53	3/11/55
3/1/53 - 3/31/53	63.42	4/20/53	6/30/53	3/11/55
4/1/53 - 4/30/53	61.46	5/20/53	6/30/53	3/11/55

<u>Period Covered</u>	<u>Amount Paid</u>		<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
	<u>Tax</u>	<u>Interest</u>			
5/1/53 - 5/31/53	66.75		6/19/53	6/30/53	3/11/55
6/1/53 - 6/30/53	61.89		7/20/53	5/26/54	3/11/55
7/1/53 - 7/31/53	70.20		8/20/53	5/26/54	3/11/55
8/1/53 - 8/31/53	68.13		9/20/53	5/26/54	3/11/55
9/1/53 - 9/30/53	62.19		10/20/53	5/26/54	3/11/55
10/1/53 - 10/31/53	59.95		11/20/53	5/26/54	3/11/55
11/1/53 - 11/30/53	65.83		12/21/53	5/26/54	3/11/55
12/1/53 - 12/31/53	63.68		1/20/54	5/26/54	3/11/55
1/1/54 - 1/31/54	67.40		2/19/54	5/26/54	3/11/55
2/1/54 - 2/28/54	58.96		3/19/54	5/26/54	3/11/55
3/1/54 - 3/31/54	63.34		4/20/54	5/26/54	3/11/55
Totals	\$3,482.34	\$165.24			

4 5. The following errors were committed in denying the claims for refund described above:

(a) The transactions were professional or personal service transactions which involved sales as an inconsequential element for which no separate charges were made and which were thus exempt under Sec. 47-2701 1(b)(3) of the D. C. Code (1951 ed.); or

(b) The transactions involved no use or consumption of any tangible personal property or purchase or sale of services and consequently were not taxable under Sec. 47-2702 of the D. C. Code (1951 ed.).

Accordingly, the taxes were erroneously collected and the refund claims should have been granted.

6. The facts upon which the Petitioner relies as the basis for this proceeding are as follows:

(a) Petitioner is a corporation and during the period from August 1, 1949, to the date of filing this petition has been engaged in the business of publishing and distributing a daily newspaper in the District of Columbia and adjoining states. The daily newspaper so published and distributed by it during the period from August 1, 1949, to March 17, 1954, was THE WASHINGTON POST, and during the period from March 17, 1954, to the date of filing this petition the daily newspaper so published and distributed

by it has been THE WASHINGTON POST AND TIMES-HERALD.

5 (b) During the period from August 1, 1949, through March 31, 1954, Petitioner received its supply of comic strips and other features from Syndicates pursuant to contracts with such syndicates.

 (c) By these contracts the Syndicates sold to Petitioner the right to reproduce in the future in its newspaper the work of the artists who made the drawings comprising the comic strips and other features. In order to facilitate Petitioner's reproduction of the drawings, the Syndicates furnished the drawings to Petitioner in the form of fiber matrices bearing impressions of the drawings. The price Petitioner paid to the Syndicates was paid for the right to reproduce the impressions on the matrices and not for the matrices, which were of inconsequential value as compared to the artists' creation and the right to reproduce the creation.

 (d) The prices paid by Petitioner under said contracts were greatly in excess of the value of blank fiber matrices, being, with respect to each feature, much more than ten times the value of the fiber matrix with no artist's impression upon it.

 WHEREFORE, Petitioner prays that this Tax Court hear this proceeding and determine that the use taxes so paid by Petitioner

were erroneously collected, that the claims for refund so denied should have been granted, and that Petitioner is entitled to a refund of the taxes and interest so paid with interest thereon, as provided by law, from the respective dates of filing the claims for refund.

* * *

TRANSCRIPT OF PROCEEDINGS

Date: July 11, 1955

Place: Washington, D. C.

* * *

10

DISTRICT OF COLUMBIA TAX COURT

THE WASHINGTON POST COMPANY,

Petitioner

vs.

DISTRICT OF COLUMBIA,

Respondent.

Docket No. 1494

WASHINGTON TIMES-HERALD, INC.,

Petitioner

vs.

DISTRICT OF COLUMBIA,

Respondent.

Docket No. 1495

The Washington Post Company,

Petitioner

vs.

DISTRICT OF COLUMBIA,

Respondent.

Docket No. 1497

* * *

20

EDWARD M. GUNDY

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

THE COURT: Will you give your name and address to the stenographer?

THE WITNESS: Edward M. Gundy, King Features Syndicate, 234 East 45th Street, New York, New York.

* * *

21

DIRECT EXAMINATION

By Mr. Bradley:

* * *

Q. Mr. Gundy, how long have you been in the employ of King Features Syndicate? A. Since April, 1937.

Q. What is your present position with that company?

A. I am business manager of King Features Syndicate.

Q. How long have you held that position? A. For the past twelve years.

Q. Will you describe to us in general the kind of arrangements your organization makes with artists with respect to features and comics? A. We make arrangements with artists to secure a market for the material, and --

Q. To what? A. To secure a market for the material, generally on the basis of sharing fifty-fifty the gross proceeds.

Q. What do you mean by "the material"? A. Their drawings, comics, cartoons.

Q. You have an arrangement with them whereby they furnish you a series of drawings? A. Yes, sir.

22 Q. And then you market the drawings? A. We also manufacture the engraving cuts, and other materials which are necessary to secure reproduction for the papers.

Q. As to that, making the engravings, first you receive the drawings from the artists, and will you tell us what mechanical processes are involved from that point on to the time you send something to the subscribing newspaper? A. Our first job is to make a zinc engraving, which is an exact reproduction of the

drawing on zinc. It is etched so that the characters in the comic strip will stand out sufficiently so that we can make a matrix - that is a stereotyping operation. We also make a proof for identification, and we send the mat and the identifying proof to the client newspaper which, in turn, makes a sterocast and uses that in order to secure reproduction in his own newspaper.

Q. Once you have the photo engraving made, what do you do with that?

MR. UPDEGRAFF: I object. It is immaterial.

THE COURT: It may be material - I will overrule the objection.

He wants to know: After you get the engraving, what do you do? What is the process?

THE WITNESS: After we secure the steel engraving, we lay it on the sterotype form and we put a matrix on top of it, and then
23 a roller will roll across the area and the impression of the engraving is taken off on to the matrix. That matrix may be cast.

MR. UPDEGRAFF: I see no materiality here, because the question here is not with respect to any taxes or obligations of the King Features Syndicate, but the amount of taxes, if any, which are owed by the petitioners, the newspaper companies.

The processes by which this syndicate produces the tangible property which it sells, or, if it is a license, the license to sell to the petitioners here, is no different than how a shoe manufacturer manufactures a pair of shoes that he sells to me.

THE COURT: If it isn't, I would like to know it.

MR. UPDEGRAFF: It is only concerned with the syndicate. We are concerned with the transaction between the newspaper and this syndicate and other people and the sales price between the two, but not what it does behind the scenes. I want to make my objection clear.

THE COURT: I cannot tell - "exactly like a shoe manufacturing process" - unless I know how it is done.

MR. UPDEGRAFF: I can give you another illustration, like shirts, or anything else.

THE COURT: I have to know that - the evidence has to show what is done. I think it is proper.

MR. UPDEGRAFF: Maybe it would be more in point, your
24 Honor, if you get printing that you go in and buy, and I see no materiality to it.

THE COURT: I think I will let the facts in. He has answered the question. They say they make the engraving and lay it down and

lay the matrix over it and it has the impression from the steel engraving, and then send it to the subscriber newspaper. Is that correct?

THE WITNESS: Send the mat to the subscribing newspaper.

By Mr. Bradley:

Q. Now, directing your attention to the raw mat before anything is done to it, where do you get that? A. That mat is supplied by the organization, the Certified Mat Corporation of West Groton, Massachusetts.

Q. Directing your attention to the photoengraving operation, is that done by your organization or do you have another organization that does that for you, which bills you for it?

MR. UPDEGRAFF: If your Honor please, my objection runs to all this type of testimony.

THE COURT: All right.

THE WITNESS: We produce the engraving in part ourselves, in our own shop and in part they are produced by the Lang Photo Engraving Company of Philadelphia.

By Mr. Bradley:

Q. Directing your attention to the period from August 1, 19 --

25 THE COURT: I would like to know to how many papers as a rule

this was sent, if it was in large quantities that they sent these mats out.

MR. BRADLEY: We are going to have that in great detail, your Honor.

THE COURT: All right.

By Mr. Bradley:

Q. Directing your attention to the period from August 1, 1949 through March, 1954, can you tell us whether King Syndicate furnished to the Washington Post in Washington, D. C., any features, daily features, in mat form? A. We did.

Q. Do you have a copy of this with you? A. Yes, I believe I have.

Q. Would you get your copy and let me give this to the Judge? A. That is, the Post?

Q. Yes.

THE COURT: Has this been initialed by Mr. Updegraff?

MR. BRADLEY: No, sir; it has not. Mr. Updegraff has not seen this until now.

By Mr. Bradley:

Q. Have you prepared a schedule showing the daily features furnished the Washington Post in mat form during the period mentioned?

26 A. I have, sir.

Q. You have that schedule with you? A. I have it before me.

Q. That schedule has at the top of it "Washington, D. C., the Washington Post" and up above that the date June 27, 1955.

A. That is correct.

Q. Now, opposite the list of features there are dollar figures. What do they represent? A. Those dollar figures represent our charge per week to The Washington D. C. Post during the period referred to.

Q. For what? A. For the right to reproduce the work of the various artists who produce the features.

Q. I mean with respect to how many features - six or what? Daily or Sunday? A. Six daily releases.

Q. Six daily? A. Yes, sir - and no Sunday.

THE COURT: There are more than six.

MR. BRADLEY: No, sir. "Donald Duck, daily" means it is furnished six days of the week exclusive of Sunday, for \$30.00.

THE COURT: Oh, I see.

MR. BRADLEY: "Daily" in newspaper parlance means
27 every day other than Sunday, and "Sunday" means Sunday, although it is a day.

THE COURT: All right.

By Mr. Bradley:

Q. Now, as to some of those features, were they furnished both daily and Sunday? A. In some cases, yes.

Q. Was there one price charged for the combined operation, daily and Sunday? A. No, sir; I believe we charged separately for the daily and separately for the Sunday.

Q. For The Post, you do? A. I believe so.

Q. I thought in some instances there was a combined charge and you had to make an allocation. A. Well, in that case the allocation would be on the 50-50 basis.

Q. Why do you take 50-50 as the basis for allocating as between Sunday and six days? A. That is a general practice in the trade.

Q. It is? A. Yes, sir.

Q. Now following, down below on this schedule there are dates and indications as to when a particular feature started or stopped. Is that correct? A. Yes, sir.

28 Q. Are those indications on the schedule correct? A. They are. I have personally checked them.

MR. BRADLEY: I offer this schedule in evidence as

Petitioner's Exhibit 46, your Honor. We have taken depositions and the last Exhibit number in the depositions is 45.

THE COURT: Any objection, Mr. Updegraff?

MR. UPDEGRAFF: I have no objection.

THE COURT: It will be received in evidence as Petitioners' Exhibit 46.

(Petitioners' Exhibit Number 46 was received in evidence.)

By Mr. Bradley:

Q. Mr. Gundy, directing your attention to the period August 1, 1949, to March 31, 1954, have you prepared a schedule indicating with respect to each daily feature, the costs per subscriber of the photoengraving and the raw mat and of the molding work involved?

A. I have.

Q. Do you have that schedule in front of you? A. I do, sir.

Q. Would you take that schedule and indicate, column by column, roughly what each column is supposed to be, what the caption means?

MR. UPDEGRAFF: Just a moment, please. I would like
29 to find out just what Mr. Bradley is getting at here. If I understand you correctly, you are attempting to get from this witness by this tabulation the cost to King Features Syndicate of these

various items?

MR. BRADLEY: That is correct. That is correct, the cost of the mechanical processes.

MR. UPDEGRAFF: Now, if your Honor please, there is absolutely no materiality or relevancy here with respect to this. We are not concerned here with the sales price of King Features Syndicate in producing something it sells to the petitioners here who pay the sales tax. That is some kind of a transaction elsewhere, outside of the District. We admit we have no right to tax King Features on any of that. This has nothing whatsoever to do with it.

THE COURT: He wants to show what was the material value of the mat.

MR. UPDEGRAFF: I understand the purpose. I would like to make my objection.

THE COURT: I don't know if this is the right way to prove it.

MR. UPDEGRAFF: It may be, whether it is right or wrong, the very basis --

THE COURT: They have a right to prove the value of the mat.

MR. UPDEGRAFF: No, sir; I don't think they have a right
30 to prove this, and I would like to explain to the Court why.
If you are going to let this petitioner say to a seller outside of the
District that produces something it sells to a customer in the District
that it can go into all of the ramifications and costs of the manufacturer
of the products, there is absolutely no reason why you cannot go, ad
infinitum, back to the pasture which was planted to grow the sheep to
produce the wool that went into a suit of clothes that was sold in the
District of Columbia.

THE COURT: Mr. Updegraff, the Court of Appeals said in
its decision that this Court found as a fact that the cost of the material
was very small, but that it paid no attention to it, and the witness
here, the purpose of putting him on the stand, one of the purposes,
is to prove just what these matrices cost, the material in it.

MR. UPDEGRAFF: This Court made a finding it was irrelevant
and immaterial, which led the Court astray in reversing this Court in
that case. That very finding, this Court did not think material, they
said they were entitled to have it, and I am trying to bring in all
sincerity to the Court's attention here now the fact that it is absolutely
irrelevant here. We are dealing under the statute, and the statute
definitions of retail sales, and the statute says they are subject to tax

under the Act. It says "sales price" - - Sales price with respect to what? It means sales price with respect to the retail sale, defined
31 in the statute. "Selling" - what kind of selling? Selling, with respect to the sales here. All these statutory definitions are tied right into the specific sales, which are the subject of the tax.

We are not concerned here with all of the ramifications and prices of sellers. We don't care what they paid or where they got the material they made into the product which was sold here. We are concerned with the transaction between the petitioners here and its seller, and the definition of "sales price" in our statute here involved says you shall not take into consideration any personal services. There are no personal services in this sale. I want to make that clear, and I object to all this type of testimony.

THE COURT: I understand that. You are over-complimentary to the Court in saying that I could mislead the Court of Appeals.

MR. UPDEGRAFF: I think that is what happened.

THE COURT: Anyhow, I will follow the Court of Appeals decision, and I think this is material, in the light of their decision.

MR. UPDEGRAFF: Have we made our position clear?

THE COURT: Yes.

MR. UPDEGRAFF: It is not necessary for us to say this

throughout the trial. I am sure Mr. Bradley's case is based on this testimony.

32 MR. BRADLEY: And also the Court of Appeals' decision.

MR. UPDEGRAFF: We object to the whole proceeding here on out on any such basis.

THE COURT: All right. You may continue your examination.

By Mr. Bradley:

Q. I think I asked Mr. Gundy to take this schedule in front of him and indicate very briefly what the caption of each column is intended to indicate, looking at the schedule.

* * *

A. The first column indicates the name of the feature supplied. The second column indicates the charge per week to the client, and the third column is a date of 8/1/49 and also the date of 3/31/54. The next column covers the --

MR. BRADLEY: I may say at that point, your Honor, we have bracketed the period involved, rather than develop the cost every day during the period.

THE WITNESS: The next column covers the prorated engraving cost, that is, the part of the engraving cost that might apply to the production of the engraving as far as this particular client is concerned.

By Mr. Bradley:

Q. Just a moment, on that cost of that item? A. Yes, sir.

33 Q. Is this photoengraving work done by outside concerns in some instances? A. In some instances the work is done by an outside concern and in some instances in our own shop.

Q. Now the next column, cost of raw mat? A. The cost of the raw mat represents the cost of half of a full mat, inasmuch as the reproduction of Donald Duck, the engravings would cover approximately a half a mat.

Q. You mean it is a half of a full mat is what is required for six daily releases? Is that what you mean? A. That is right.

The next column covers the cost of molding the material, molding the engraving, that is, securing the impression on the raw mat.

The next column indicates the total cost. The following two columns indicate the increased charge to the client prorated through the various features, that is, the increase during the period between 8/1/49 and 3/31/54.

Q. In other words, you started out with a price, August 1, 1949, of \$30.00 for six daily releases for Donald Duck and you ended up March 31, 1954, with a charge for six daily releases for \$10.91

more, or \$40.91? A. That is correct.

Q. What are the figures in the last column? What do they
34 indicate? A. The figures in the last column indicate the
number of clients.

Q. Number of newspapers? A. Number of newspapers
securing the right to reproduce these various features.

Q. Directing your attention to the column captioned "En-
graving" let us take, for example, Steve Canyon, down there in
the middle of it. A. Yes, sir.

Q. You have 1051. What does that figure mean? Is that
cents or what.

THE COURT: He has a decimal point in front of it. Every
one of them has a decimal point.

MR. BRADLEY: Most of them - some of them do not.

THE WITNESS: That is approximately 10-1/2 cents in the
first instance, and a little over 14 cents in the next instance.

THE COURT: I thought all of them had - I am sorry.

By Mr. Bradley:

Q. Take Steve Canyon there, ten and a fraction cents are
photoengraving costs. From what source did you get that figure?
Tell us briefly. A. My source for that figure is an invoice from the

Lang Company, who produced the engraving.

* * *

36 Q. That invoice in front of you is one from which you arrived at the source information in putting down the figure of ten and a fraction cents? A. That is right.

Q. And that is the invoice from the Lang Company to King Features Syndicate? A. Yes.

Q. What is the date of the invoice? A. Dated August 15, 1949.

Q. Was that invoice paid by King Features Syndicate? A. It was.

MR. BRADLEY: I offer this in evidence as Petitioners' Exhibit 47.

MR. UPDEGRAFF: I object to it on the same grounds as heretofore stated.

THE COURT: All right; I will overrule the objection.

* * *

37 MR. BRADLEY: I offer in evidence this document as Petitioner's Exhibit 48.

THE COURT: Now, Mr. Updegraff, do you object to that?

MR. UPDEGRAFF: I object to Petitioners' Exhibit 48 on all

those grounds stated heretofore.

THE COURT: I overrule the objection.

* * *

38 MR. BRADLEY: That is the exhibit marked in the upper right-hand corner "August 1, 1949 through March 31, 1954."

By Mr. Bradley:

Q. Now, directing your attention to petitioners' Exhibit 47, which is the invoice to which you have testified, opposite Steve Canyon on it are two figures. One is \$2.10 and the other is \$2.80. What do they represent? A. The \$2.10 represents the charge by the Lang Company for a single day's release, the engraving of a single day's drawing, or release.

Q. For what size? A. Four columns.

Q. Four-column width? A. Four column width.

Q. And what does the figure below that \$2.80 represent?

A. That represents the daily charge to King Features for an engraving five columns in width.

Q. Do you mean the daily charge or the charge for six days?

A. The \$2.80 represents the charge.

Q. For one -- A. For one day's release.

Q. And that figure, multiplied by six, six at \$2.10, gives you

the figure of \$12.60 and for the second six at \$2.80 gives you the resulting figure of \$16.80, the invoice figure? A. That is correct.

* * *

39 Q. In getting up this Exhibit 48, have you included both or one of the two figures that you mentioned? A. I have included both of the two figures, both four-column and five-column.

Q. Tell us why you did that? A. I have endeavored to secure the basic engraving costs and our clients have the option of taking.

THE COURT: Wait. If that is an agreement in writing, then we want the agreement.

MR. BRADLEY: Sir, we are going to put all of the contracts in evidence. We cannot do it all at one time.

THE COURT: Then this testimony is not proper, I believe. Let him testify about the facts. He took that and that is all.

40 By Mr. Bradley:

Q. You took both, and added them together? A. Yes.

Q. And what did you do with that figure? A. I divided that figure by the number of clients receiving Steve Canyon.

Q. And the resulting figure with respect to Steve Canyon was what?

THE COURT: He has it in there.

MR. BRADLEY: I want to be sure you understand it.

THE COURT: I understand it.

THE WITNESS: Ten forty.

By Mr. Bradley:

Q. Now, do you have a similar invoice for Steve Canyon with respect to the date March 31, 1954? A. Yes, sir.

Q. March 31, 1954? A. Yes, sir.

Q. That is a bill from Lang Company dated March 19, 1954 to King Features? A. King Features.

Q. King Features. Was that invoice paid by King Features Syndicate? A. It was.

Q. Was that used as a source in arriving at the figure appearing in the large schedule opposite Steve Canyon in respect to the date March, 1954? A. It was.

MR. BRADLEY: I offer this invoice in evidence as Petitioner's Exhibit 49.

MR. UPDEGRAFF: I have the same objection as I did to Exhibit 48.

THE COURT: It is received in evidence. Your objection will be overruled.

(Petitioners' Exhibit Number 49 was received in evidence.)

By Mr. Bradley:

Q. You mentioned with respect to some other figures appearing in the engraving column, Exhibit 48, that they represented engraving work done in your own plant, did they not? A. That is correct.

Q. Tell us briefly how you arrived at the figure you put on that schedule, in instances where the photoengraving was not done by a separate concern and instead was done by your own plants.

MR. UPDEGRAFF: Same objection.

THE COURT: Overruled.

THE WITNESS: In engraving our own work I don't attempt to charge ourselves, so there is no invoice available, however, in arriving at the prices noted on the large exhibit, I took the commercial
42 rate which applies to Steve Canyon inasmuch as the area of the four-column engraving and the area of the five column engraving is approximately the same, on all of the features supplied.

By Mr. Bradley:

Q. Now, in all instances in which you had photoengraving work done by the Lang Company for you for the daily features appearing on Exhibit 48, do you have the invoices with you here? A. Yes, sir (handing).

Q. In all instances, do you have the invoices where Lang Company billed you? A. Where Lang Company did the work, yes, sir.

MR. BRADLEY: Your Honor, he has a great number of invoices here. He has extracted information from them and used it in preparing this exhibit. If Mr. Updegraff insists, I will take the time of the Court to put them in evidence.

THE COURT: Mr. Updegraff says he objects to all this, and it is your case. You do whatever you think you should do. It is up to you.

By Mr. Bradley:

Q. Do you have a large number of invoices with you? A. I have a large number of invoices, covering the various dates.

Q. Which date does this cover (indicating)? A. '49, '51, '54.

43 Q. Now, what about the figures under the column entitled "Mat costs"? What was the source from which you obtained that information? A. The cost of the raw mat was obtained by an actual invoice from the Certified Dry Mat Corporation, billed to us at the time noted.

Q. Do you have those invoices with you? A. Yes, sir.

THE COURT: Can't you put them in in a group?

MR. BRADLEY: That is what we will do, or try to, your Honor.

By Mr. Bradley:

Q. Let's take the '49 group first. A. Oh, all right. That is the substantiation of the mats, mat charges.

Q. Are these all Post mats? Do you have any Times-Herald ones? It is the same thing, isn't it? A. The same thing.

Q. Let's leave these invoices for a moment. Have you prepared a schedule similar to schedule marked Exhibit 48, with respect to features furnished the newspaper, Times-Herald? A. Yes, sir.

Q. Invoices which are in the groups in your hand, invoices used in preparing that schedule also? A. Yes, sir.

44 MR. BRADLEY: I offer in evidence as Petitioners' Exhibit 50, a group of invoices to which is stapled a sheet marked "August, 1949" and ask that these invoices be stapled together and marked as Petitioners' Exhibit 50.

THE COURT: Mr. Updegraff, you still object to it?

MR. UPDEGRAFF: I still have that objection.

(Documents handed to counsel.)

I have the same objection as to Petitioners' Exhibit 48, and I might suggest to your Honor that rather than mark them as a group they be marked as sub-numbers, A, B, C and so on.

THE COURT: Put them together, but mark them as Petitioners' Exhibits 50-a, b, c, d, and so on and so forth.

(Petitioners' Exhibits 50-A through 50-J were received in evidence.)

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By Mr. Bradley:

Q. Now, directing your attention to a group of invoices attached to a sheet marked March, 1951, will you tell us whether these invoices were received by King Features? A. They were.

Q. And did King Features pay them? A. We did.

45 Q. Will you tell us whether these invoices were used in preparing the large schedule which has been marked Petitioners' Exhibit 48, and also a similar schedule which will be later introduced, for the Times-Herald? A. They were, yes.

MR. BRADLEY: Now, I offer these in evidence as Petitioners' Exhibits 51-A through 51-U, and as to these I ask leave to withdraw the originals and substitute photostats.

MR. UPDEGRAFF: The District has the same objection to

it as it has to Petitioners' Exhibit 48, on the same grounds.

THE COURT: Objection overruled. They will be received in evidence as Petitioners' Exhibits 51-A through 51-U.

(Petitioners' Exhibits 51-A through 51-U were received in evidence.)

* * *

By Mr. Bradley:

Q. Directing your attention to a group of invoices to which is attached a sheet on which is inscribed "March, 1954" will you tell us whether they were received by King Features, and whether King Features paid the invoices? A. Those invoices were received by King Features, and they were paid by King Features.

THE COURT: You are referring to Exhibit Number 51?

MR. BRADLEY: March, '54.

46 THE COURT: What is the number of the exhibit?

MR. BRADLEY: I have not given it a number yet.

By Mr. Bradley:

Q. Were these invoices used by you as source material in preparing Petitioners' Exhibit 48, and the subsequent exhibit, in regard to the Times-Herald? A. They were.

MR. BRADLEY: I offer these invoices in evidence as Petitioners' Exhibits 52-A through 52-M.

MR. UPDEGRAFF: I have the same objection.

THE COURT: The same ruling.

(Petitioners' Exhibits Numbers 52-A through 52-M were received in evidence.)

By Mr. Bradley:

Q. Now, directing your attention to the period from March, 1951 through January, 1952, and from April, 1953 through March, 1954, can you tell us whether or not King Features Syndicate furnished daily features in mat form to The Washington Times-Herald? A. We did.

Q. Have you prepared a schedule listing the features so furnished it in the same fashion similar to the schedule which has previously been put in evidence as Petitioners' Exhibit Number 46?

A. I have.

47 Q. Is this such a schedule (handing)? A. It is; yes, sir.

MR. BRADLEY: I offer this schedule in evidence as Petitioners' Exhibit 53.

THE COURT: Mr. Updegraff, your objection does not go to this. It is just the list they furnished and price per week. Do you have any objection?

MR. UPDEGRAFF: I have no objection, subject to an explanation of the deletion.

By Mr. Bradley:

Q. I notice on the second page of this deleted item, reading "January 17, 1954" and beneath this reading the same as above, except "Try and Stop Me." A. That Item was deleted because we did not supply mats for that feature, but only proofs for it, for the feature.

THE COURT: All right. Do you have any objection?

MR. UPDEGRAFF: No objection.

THE COURT: Received in evidence as Petitioners' Exhibit Number 53.

(Petitioners' Exhibit Number 53 was received in evidence.)

THE COURT: Can't we shorten this testimony as to the costs? If the witness testified that he took them from the invoices, the invoices are already in, and we can check them if we want?

MR. BRADLEY: Yes, sir; we are almost through with this testimony.

48 THE COURT: All right.

By Mr. Bradley:

Q. Directing your attention to the same period, have you prepared a schedule showing the engraving costs, cost of raw mat, molding costs, et cetera, for the Times-Herald, in the same fashion

as the schedule prepared for The Washington Post features, which has been put in evidence as Petitioners' Exhibit 48? A. I have.

THE COURT: Do you object to that testimony?

MR. UPDEGRAFF: Objection, on the same grounds we stated, as to Petitioners' Exhibit 48.

THE COURT: I will overrule the objection.

By Mr. Bradley:

Q. Is this the schedule prepared by you? In the upper right-hand corner 3/1/51 to 3/31/54? A. This is the schedule referred to.

MR. BRADLEY: I offer this schedule in evidence as Petitioners' Exhibit 54.

THE COURT: Subject to the objection, it will be received in evidence.

(Petitioners' Exhibit Number 54 was received in evidence.)

By Mr. Bradley:

49 Q. Now, as to both exhibits 48 and 54, can you tell us whether each photoengraving item is supported by an invoice for the particular mentioned, or whether there are some where there are no invoices with respect to the particular feature? I don't mean by detailing each one. Just tell us whether that is so or not?

A. In general, we have items throughout both of these schedules which are supported by invoices from the Lang Company and in other cases we have used the same approximate charge the Lang Company would have made had they done the work, they being an outside commercial firm.

* * *

Q. Who did the work in those other cases? A. We ourselves.

Q. Directing your attention to Petitioners' Exhibit 54, and the feature referred to as Little Miss Muffett, I notice that the photoengraving cost is considerably higher than it is with respect to any of the other 50 features. A. That is correct.

Q. Can you give us any information about that, as to why that is? A. In the case of Little Miss Muffett, this feature, it will be noticed, has very considerably fewer clients than any of the other features listed, having only 18 clients, the pro rata assigned cost of engraving, in this instance, is very much higher than would be normal. The reason for our carrying a feature and continuing to produce a feature with so few clients is that the artist for little Miss Muffett is an ageing lady, Fanny Y. Corey, who is more or less on our pension roll. She was to continue doing the strip, and we produce it at a loss, instead of just paying her a pension.

Q. Now, directing your attention to the second page of that same exhibit, Petitioners' Exhibit 54, I notice there is no photo-engraving cost listed for Burris Jenkins. Can you tell us why?

A. In that instance we receive or borrow the engraving, which was produced by the New York Evening Journal, so there is no cost to us for its use.

Q. Now, above that on that page there is a feature called Crossword Puzzles, and no engraving cost appears in connection with that. Can you tell us why that is? A. The Central Press

51 Crossword Puzzle we produce in our own shop and the Lang Company produces nothing like it whatsoever. So I have no means from an outside invoice, of trying to determine what it would have cost for it to be done outside, inasmuch as we do not keep a day-to-day cost in our own shop and don't ever invoice ourselves.

* * *

52 Q. Now, these schedules that have been put in evidence as Petitioners' Exhibits 54 and 48, appear to bracket certain periods with respect to time.

For instance, Exhibit 48 has two dates, August 1, '49 and March 31, '54, and you have given us cost data as to each of those dates, but no cost data as to the period in between. What can you

tell us about the cost data with respect to the period between? A. What we know for certain is that the cost of production was rising during the period.

Q. Now, as to Petitioners' Exhibit 54, which covers two dates, 3/1/51 and 3/31/54, what can you tell us as to the cost data between that, those dates? A. The answer would be the same.

Q. Now, as to both exhibits 48 and 54, you have an item "Molding Costs"? A. Yes.

Q. Can you tell us from what source you obtained the information under that caption, the figures under that caption? A. We retained and still do retain statistical studies which show the cost of molding a mat or a given number of mats.

Q. Is that in your own plant? A. Yes.

53 Q. Do you do molding work for other concerns or don't you?
A. Yes, we do - we do commercial molding.

* * *

Q. Now, Mr. Gundy, what is the practice of your syndicate in case a client to which you send a mat loses it and asks for another one?

MR. UPDEGRAFF: I object on the same grounds as stated with respect to Petitioners' Exhibit 48.

THE COURT: What is the question?

MR. BRADLEY: What is the practice with respect to this situation: If a newspaper asks for a mat to replace one which is lost, what does the syndicate do in that respect?

THE WITNESS: Furnishes another mat.

MR. UPDEGRAFF: I object.

THE COURT: I overrule the objection. He wants to see if it has probative value. He asks the charge practice.

MR. UPDEGRAFF: He said "a newspaper."

THE COURT: I think your objection is well taken. Just take the papers that are in this case.

MR. UPDEGRAFF: I think it ought to be confined as nearly
54 as possible.

THE COURT: To the time and papers under consideration.

By Mr. Bradley:

Q. If The Washington Times-Herald, at any time covered in the periods relating to it, requested you to furnish a duplicate mat because it lost the one furnished to it, what would you do?

A. Furnish them a second mat.

Q. Would you make any separate charge for that? A. No charge for such services.

Q. Is the same true with respect to The Washington Post, during the period relating to it? A. Yes, sir.

MR. BRADLEY: I think that is all, Mr. Gundy.

* * *

56 THE COURT: Do you see any material difference between your projects and the manufacturing of calendars, essentially?

* * *

THE WITNESS: I am sorry, your Honor, I am truly not acquainted with the process by which calendars are manufactured.

THE COURT: I don't mean the process; I mean the project, the calendar containing portraits, art calendars, things of that kind. Do you see any difference between what is done here and the manufacturing of calendars?

THE WITNESS: The manufacturing of calendars might be done in several ways, by offsetting, and other mechanical means of reproduction. We do nothing in the way of reproducing anything here. We make the raw material whereby the other reproduction may be
57 secured in the newspaper. I am not trying to be evasive, sir.

THE COURT: I understand, what you manufacture is the instrument of reproduction?

THE WITNESS: Yes, sir.

THE COURT: And that is what you sell to the newspapers?

THE WITNESS: That is right.

* * *

THE COURT: Do you have any other witnesses?

MR. BRADLEY: Yes, sir. And we could start reading the depositions.

THE COURT: Well, I can read the depositions.

MR. BRADLEY: My thought about it, sir, is to have some process whereby Mr. Updegraff objects to a particular exhibit put in evidence through means of the deposition, on the ground of relevancy, he can make his objection.

58 THE COURT: From a cursory glance at the deposition, if I understand Mr. Updegraff's objection, it goes to every bit of this testimony. Now, I think he ought to have the opportunity --

MR. BRADLEY: That is why I am proposing to read it. Let us read the deposition over and him make his objection as it is read. He may object to the whole thing.

MR. UPDEGRAFF: I have not seen it, your Honor. I don't know what the witness testified to, but I have several objections without even seeing it.

The first objection is: We renew all of our objections as set forth

in our motion to vacate which your Honor overruled, included in which we had in mind the specific requirement of the Court's basic statute which requires the Court to hear a case. I don't know of any possibly way of your Honor hearing a witness up in New York. I don't know of any way your Honor could compel a witness in New York to come here.

THE COURT: Do you think the rule of this court, in relation to depositions, is invalid?

MR. UPDEGRAFF: I think it is in so far as it extends beyond the limits of the jurisdiction of the District.

* * *

59 MR. UPDEGRAFF:

* * *

Now, in addition, I am just trying to give your Honor my objections on this. In addition to that we object to the testimony of the witnesses contained in the deposition in toto on the grounds stated with respect to our objection as to Petitioners' Exhibit 48.

* * *

THE COURT: Well, as to the first objection, I think I have already ruled on that, and as to the others I am going to reserve my ruling on that, because there may be part of this

deposition that is objectionable, on other grounds, and I will study it when I read it.

I think we are wasting time by having someone on the stand here answering the deposition - answering the questions.

60 MR. BRADLEY: It is all right with me, sir. I want to make sure the deposition is put in.

THE COURT: You offer it in evidence. It is received by the Court here now and stamped "Filed". If you want to offer it in evidence, you may, and Mr. Updegraff objects to it, and I will reserve my ruling until I read it.

MR. BRADLEY: Yes.

* * *

MR. BRADLEY: I offer in evidence depositions of Henry G. Lahm, James Hennessy, Frank J. Murphy, and Joseph D. McGraw, taken in New York City on July 6th pursuant to notices which are attached to the depositions, and I also offer in evidence the exhibits which have been filed in this court with the depositions.

THE COURT: Now, Mr. Updegraff, do you object to it or don't you?

MR. UPDEGRAFF: I object to all of it on the grounds heretofore stated, to your Honor.

* * *

67

ROBERT P. THOME

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION:

By Mr. Bradley:

Q. Give your name and address to the reporter, please.

68 I am with The Washington Post Company. My address 201 North Wayne Street, Arlington.

Q. Are you in the employ of The Washington Post Company, sir? A. Yes.

Q. How long have you been employed by it? A. Since August, 1948.

Q. What positions have you held? A. Assistant Comptroller.

Q. Have you recently, Mr. Thome, looked through the Post and Times-Herald contract files? A. Yes, I have.

Q. To determine what contracts were in effect during the periods involved in this case? A. Yes.

Q. Do you have the originals and the files, please? A. Contracts?

Q. The contract files containing the originals, with you? A. They are right here.

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104 Q. Mr. Thome, can you tell us whether a syndicate makes any separate charge to your newspaper for features, daily features, it furnished to it in mat form or whether it is a flat charge for the total services? A. To the best of my knowledge it is a flat charge. There is no separate charge made for the mat in any case I can think of.

The Court: You pay them a certain sum?

The Witness: It usually is a weekly rate.

The Court: What do you get in return?

The Witness: You get the mat and the right to publish it, to reproduce it.

By Mr. Bradley:

Q. Did The Post at any time in 1949 have occasion to purchase raw mats from anyone? A. We used raw mats in our operation.

105 Q. What did you use them for? A. Well, we use mats for two purposes. One is a part of the process of getting your type and cuts into a stereotype type plate for printing on the presses. You make up a page mat of each page that goes into the paper, and from that mat you get a press plate which of course is made out of metal. Then we also syndicate a Herb Block cartoon, that is, it is syndicated through the

Post-Hall Syndicate.

Mr. Updegraff: I object to this testimony as immaterial and irrelevant.

The Court: I think so. I sustain it.

What is the purpose of it.

Mr. Bradley: I simply asked him if he had occasion to use a raw mat. The next question, will be whether he buys a raw mat and next what he pays for it.

The Court of Appeals indicated, quoted testimony in that case as to what they paid for raw mats. That is why I think it is relevant.

The Court: You didn't ask him that. All right.

By Mr. Bradley:

Q. What did your company pay for raw mats in 1949?

Mr. Updegraff: I object on the same basis, the same grounds that I objected to the prior testimony set forth at the outset of this trial, and with respect to Petitioners' Exhibit 48. This 106 has nothing whatsoever to do with the contract here involved, what they paid somebody else not the ones with whom they had the contracts for the supplying of these mats, but somebody else for some other mat for some other purpose has nothing to do here.

The Court: Mr. Updegraff, what counsel is trying to prove--

Mr. Updegraff: I understand.

The Court: -- is what was the value of the physical, of the material ingredient in this. Now the Court of Appeals said that was controlling.

Mr. Updegraff: If your Honor please, it goes right back to my initial objection here, and I say we have to look at the statute. I don't think what the Court of Appeals has said has a thing to do with this case here. We are supposed to be, I think, looking at this from the standpoint of the statute and what the statute said.

Here is their contention. They say, as I understand it.

The Court: The Court of Appeals?

Mr. Updegraff: I am talking about the petitioners here. I have not gotten to the Court of Appeals yet, your Honor. I am talking about this case, and the statute that applies to the taxes here involved. The statute defines "retail sale" and says what shall be taxable, then it goes on and says and brings it down to the petitioners' contention, "The term 'retail sale' shall not include," and I will read the pertinent part, "professional insurance, or,"
107 --here-- "personal service transactions which involve sales as inconsequential element for which no separate charges are made."

Now it is a personal service transaction that he is talking about and talking about sales that are defined in this.

The Court: Now the Court of Appeals said this was a personal service and that the matrices and mats were inconsequential.

Mr. Updegraff: Let us assume the Court of Appeals said that about this. They are now afield here on something else again; the sales that were made to this petitioner by somebody else as to mats used for some other purpose has not one bit of business in this case, if the Court please, and has nothing to do with it.

The Court: It does indicate how much.

Mr. Updegraff: If your Honor please, we are talking here about a sales price. We are talking about a retail sale.

The Court: That is what the Court of Appeals said.

Mr. Updegraff: If your Honor please, will you hear me on this or not?

The Court: Yes.

Mr. Updegraff: We are talking about a sales price defined by the statute, a retail sale defined by statute, and its exclusions; we are not talking about sales made by somebody else. We are talking about this, by the witness' own testimony adduced by Mr. Bradley here just a moment ago, there is no break down here,

there is no separate charge here; it is all one lump sum for this mat and the right to use it.

108 Now under the use tax statute, it includes a license to use in part of the retail sale. We pointed that out. The trouble with this case here is, if your Honor please, somewhere along the line someone has gotten away from our statute and the question here involved. We are talking about this sale, this sale between this petitioner and a syndicate, and all the rest of them in the same type, not a sale made to the petitioner by somebody else, involving some other mat for some other purpose, but this one, the one that is taxed, not some other sale that might or might not have been taxed because it was or was not a retail sale, but these sales here.

And to me, you have to look at the statutory definitions here and keep in mind at all times what we have to decide. It is not some other sale.

Now, your Honor said in making that finding that you didn't think it was material, but you made it, about this inconsequential element. You thought they ought to have it to go up to the Court of Appeals.

The Court: The Court of Appeals said that I made it but didn't pay any attention to it.

Mr. Updegraff: But it was made on this type of testimony, if your Honor please, which is wrong, and the Court of Appeals recognized it was wrong.

The Court: Mr. Updegraff, I agreed with you before that it was wrong.

109 Mr. Updegraff: Is there any reason why your Honor has to make a second wrong decision here.

The Court: They said I was right in making findings of fact but wrong in not paying attention to them.

Mr. Updegraff: I am trying to straighten out what has gotten so crooked that nobody can see around the corner.

Mr. Bradley: Trying to straighten out the Court of Appeals?

Mr. Updegraff: Maybe so. That may be so and may not. Please do not interrupt me while I am talking to the Court.

The Court: Let me explain this to you, as I understand the witness: What did they pay for mats that they used? It is to throw light on the cost of the material that went into these matrices. We had testimony as to what it cost in New York. But what value is down here in Washington may be important, and let us say that the witness testified that for a full page matrice or mat they paid X number of cents or X sum of dollars. It will assist me to come to

the conclusion what was the material value of the stuff that was used.

Mr. Updegraff: If the Court please, for these sales that were taxed they paid X dollars that is shown in the contract and was a lump sum and nothing whatso --

The Court: What was the value of the physical thing, the mat? For instance, let us suppose you go to a doctor and he gives you a prescription and he writes it out on a piece of paper, it is important.
110 The law is that that paper is inconsequential, and you don't charge, it is not a sale?

* * *

The Court: They are trying to prove it is inconsequential, and I think it is proper to do it. I am going to overrule your objection. I am going to let the witness testify as to what they paid for matrices, size, and so forth, so we can come to some conclusion.

* * *

111 Q How large a mat did you buy? A. Full page size.

Q. Full page size? A. Yes.

Q. How much would you pay for the full page size?

The Court: Not "would you", did he pay.

The Witness: The price in 1949 was 16-1/2 cents for a commercial mat.

By Mr. Bradley:

Q. A full page. Do you mean a page approximately the size of a newspaper page? A. That is right.

The Court: What was it during the period covered by this suit?

The Witness: Averaged from 16-1/2 cents up to 20 cents, for a page mat.

By Mr. Bradley:

Q. During the period '49 through March '54? A. Yes, for a full page mat.

* * *

The Court: Was this a paper mat that you could pour metal in?

112 The Witness: Yes, it is the commercial type of mat, the same type of mat that the syndicates use.

The Court: And you use it to pour the metal in?

The Witness: To get a cast.

* * *

113 By Mr. Bradley:

Q. I show you Petitioners' Exhibit 90, for identification.

* * *

Q. That was the form in which you received a comic strip for a daily release? A. That is right.

Q. What about six daily releases, are they on that or are they separate? A. Normally, I would say they come in six to a strip, and sometimes they are only three to a strip, in which event they would tape the two sections of three each together, and they make a cast for all of the strips that are scheduled for a particular week.

Q. This material that you received from the syndicate, you received something that is made out of fiber that looks like this and is how much bigger than that, roughly? A. It would be six times this, if there were six days.

114 Normally that is the way they sent them out, six days.

Q. Six days? A. Yes.

Q. What you have in your hand, Exhibit 90, is for one day? A. That is right.

Q. When you receive that and you are getting ready to print your paper for one day, going to put in a comic strip for one day, what do you do with that mat, Exhibit 90? A. Normally, they make a cast for six days at one time, because it is economical to do it that way, and then they cut it in strips like this for one day.

The Court: Let's number it.

Mr. Bradley: It has been numbered, sir, as Petitioners' Exhibit 91.

The Witness: And this is a cast made from this mat.

The Court: Now, where does that cast go?

The Witness: The cast is put in a form when they schedule run date is up for the particular comic. You see the date is carried on the comic when it is scheduled to run. What they do is make these up in advance. It might be a week, or so, before the comic is scheduled to run, and they have them filed in date sequence.

The Court: Where does that -

The Witness: Case.

The Court: -- cast go?

115 The Witness: The cast goes into a page form which has all of the other printed material that is to go on a particular page of a paper, advertising or editorial matter.

By Mr. Bradley:

Q. That is all set up in metal? A. That is right.

Q. And they take those pieces of metal and put it together to make a full page mat? A. This full page mat.

Q. Out of metal first? A. That is right.

Q. And then what do you do with the metal page? A. Make the page mat which you see here.

Mr. Bradley: Page mat is Exhibit 92.

The Court: Let me look at that just a second.

(Handed.)

By Mr. Bradley:

Q. Now, when you get through making this page mat, which has been identified as Petitioners' Exhibit 92, what is the next mechanical process? A. It would be to make a presser, stereotype press.

Q. Is that a metal plate? A. Yes; that is placed on the printing press.

The Court: Do you just pour hot metal for that?

The Witness: It is a metal. I am no production expert, but
116 they actually get the impression from the mat onto the metal
plate by some mechanical process.

* * *

Q. Is the paper printed from that metal plate? A. Yes.

* * *

125 THE COURT: What testimony have you, Mr. Updegraff?

MR. UPDEGRAFF: I have none.

I want to enter an additional objection to the depositions. I notice that all of the exhibits in there, or most all of them, anyway, are of like tenor as those introduced with respect to Petitioners' Exhibits 48, 54 and so on.

THE COURT: Yes.

MR. UPDEGRAFF: And I want my objection running to Petitioners' Exhibit 48 also to go to the exhibits attached to the deposition.

THE COURT: Each exhibit?

MR. UPDEGRAFF: Yes.

* * *

THE COURT: I will not rule on that until I get a chance to read it. If any other objections occur to you, do not hesitate to pose them.

* * *

126 THE COURT: Do you want to file briefs? I will tell you what my trouble is here:

I have two cases, one opposed to the other, one early case decided by Judge Van Orsdell, who said this was not a personal service contract, and the other decided by Judge Miller; and had the early case been called to Judge Miller's attention, I wouldn't have

felt like I do now, but it wasn't, and he did not see it until after he decided the second case.

The question is whether I should follow the early case or the later case.

MR. BRADLEY: I am willing to argue that right now.

THE COURT: There is no use arguing. I suppose I will have to follow the latter case, because that is specific on this very point, while the other, I think they decided the same thing in a different way. The other one was addressed to an injunction, and that is why the Corporation Counsel never found that case, and I
127 never found it.

MR. UPDEGRAFF: I don't think anybody found it. The Court didn't find it. Counsel for the newspaper companies did not find it, as far as I know. I learned about it through Mr. Yateman, who called me up and said he was amazed.

THE COURT: All right. I want to make some observations on this case.

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140

DISTRICT OF COLUMBIA TAX COURT

THE WASHINGTON POST COMPANY,

Petitioner,

vs.

DISTRICT OF COLUMBIA,

Respondent.

DOCKET NO. 1494

DOCKET

Date	Proceedings	Memorandum
1955		Use Taxes Taxes \$3,482.34 Interest 165.24 <u>\$3,647.58</u>
April 5	Pet. filed. TP. AA. & CC., served.	
May 4	Hearing set for May 26. TP. CC & AA served.	
" 19	Pet mot to consolidate for hearing and continuance of hearing - Granted Copies served AA., CC & TP.	
June 3	Hearing set for June 27- All parties served.	
" 15	Pet's motion for continuance - Granted to July 11. All parties served.	
" 30	Resp mot to vacate notice of taking deposition.	
July 5	Opposition to motion to vacate notice of taking of deposition. Memo concerning motion to vacate notice of taking deposition. Order.	
" 11	Entry of Appearance - John B. Marshall	
" 11	Hearing - George C. Updegraff for District. Stipulation filed by petitioner.	
" 25	Memo. with respect to proper party to petition Tax Court for Refund of Taxes paid by Washington Times-Herald. Request for Findings of Fact and Conclusions of Law - filed by petitioner. Copy served Corporation Counsel.	

Date	Proceedings	Memorandum
Aug 9	Respondent's Objections to Petitioners' proposed Findings of Fact and Conclusions of Law. - Service.	
" 29	Memorandum Opinion concerning Objection by Respondent to Introduction of Depositions. Order Overruling Objections to Introduction of the Depositions. AA., CC & TP served.	
Sept. 6	Findings of Facts, Opinion - AA., CC & TP served.	
" 30	Decision	
Oct 3	Amended Decision.	
" 26	Petition for Review filed by District of Columbia Service. Statement of Points on Review.	
" 28	Designation of Record - Certificate of Service.	
Nov 3	Designation of Additional Portions of Record. Certificate of Service.	
Dec 5	Order Extending Time for Filing Transcript of Record on Review. Order for Delivery of Original Exhibits. Copies mailed attorney for petitioner. - Attorney for respondent.	

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141

NOTICE OF TAKING OF DEPOSITIONS

Please take notice that the depositions of the witnesses listed below, whose addresses are also listed below, will be taken upon oral examination on July 6, 1955, commencing at 10:00 A.M. and continuing thereafter until completed in Room 1402 at 305 Broadway, New York City:

142

Name of WitnessAddress of Witness

Henry G. Lahm

c/o Chicago Tribune - New York
 New Syndicate
 220 East 42nd Street,
 New York 17, New York

James Hennessy

c/o United Features
 220 East 42nd Street,
 New York 17, New York

William J. Fitzsimmon

c/o New York Herald Tribune
 230 West 41st Street,
 New York, New York

Joseph D. McGraw

c/o Post Hall Syndicate
 342 Madison Avenue
 New York 17, New York

 Fontaine C. Bradley

Attorney for Petitioners
 Union Trust Building
 Washington, D. C.

Date: June 27, 1955

Received a copy of the foregoing Notice this 27th day of June, 1955.

George C. Updegraff
 Asst Corp. Counsel, D. C.

 Attorney for Respondent.

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143

NOTICE OF TAKING OF DEPOSITIONS

Please take notice that in addition to the witnesses heretofore noticed, the deposition of Frank J. Murphy whose address is c/o McNaught Syndicate, 60 East 42nd Street, New York City, will be taken upon oral examination on July 6, 1955, commencing at 10:00 a. m. and continuing thereafter until completed in room 1402 at 305 Broadway, New York City.

/s/Fontaine C. Bradley
 Attorney for Petitioners
 Union Trust Building
 Washington, D. C.

Dated: June 30, 1955

Received a copy of the foregoing Notice this 30th day of June 1955.

/s/George C. Updegraff
 Asst. Corp. Counsel, D.C.
 Attorney for Respondent

* * *

FILED
 JUN 30 1955
 District of Columbia Tax
 Court

144 MOTION TO VACATE NOTICE OF TAKING DEPOSITIONS

The respondent, by its counsel, moves the Court to vacate the notice received June 27, 1955, by counsel for respondent to take the

depositions of four persons in the City of New York, New York, on July 6, 1955, in the above-captioned proceeding.

The grounds of this motion are:

(1) There is no statutory authority for the taking of depositions in an appeal pending in this Court.

(2) This Court's Rule 29 is not applicable to the taking of depositions outside the District of Columbia.

(3) The persons mentioned in the notice, whose depositions petitioner seeks to take, cannot be reached by the processes of this Court.

(4) Petitioner has not tendered payment or consented to pay respondent's expenses incident to the taking of any deposition in this case.

(5) It has not been shown that any part of the proposed depositions would be admissible under the rules of evidence of this Court, or for what purpose, if any, the depositions are to be taken.

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146

FILED
JUL 5 1955

**MEMORANDUM CONCERNING MOTION TO
VACATE NOTICE OF TAKING DEPOSITIONS**

The petitioners in the three above-entitled causes served upon

the respondent on June 27, 1955, notice to take the depositions of four persons in the City of New York, N. Y., on July 6, 1955. On June 30, 1955, the respondent filed a motion to vacate notice of taking depositions on the following grounds:

(1) There is no statutory authority for the taking of depositions in an appeal in this Court.

(2) This Court's Rule 29 is not applicable to the taking of depositions outside the District of Columbia.

(3) The persons mentioned in the notice, whose depositions petitioner seeks to take, cannot be reached by the processes of this Court.

(4) Petitioner has not tendered payment or consented to pay respondent's expenses incident to the taking of any deposition in this case.

(5) It has not been shown that any part of the proposed depositions would be admissible under the rules of evidence of this Court, or for what purpose, if any, the depositions are to be taken.

147 The petitioners have opposed the motion and filed a memorandum in support.

The Court does not believe that the motion to vacate notice of taking depositions should be granted for the following reasons:

Sec. 2408, D.C. Code, 1951 Ed., provides that the District of Columbia Tax Court shall adopt and promulgate rules of procedure for the determination of matters within its jurisdiction. Rule 29 of the rules of procedure of the District of Columbia Tax Court provides as follows:

"Depositions shall be taken and used and discovery had in hearings before the Court in accordance with rules relating to depositions and discovery in force in the United States District Court for the District of Columbia at the time the taking and use of the depositions or discovery is sought, in so far as such rules are applicable. Depositions shall be mailed and addressed Clerk, District of Columbia Tax Court, 322 Municipal Court-Civil Division Building, Washington 1, D. C."

Rule 30 of the Federal Rules of Civil Procedure, entitled Depositions for Oral Examination, provides, as far as pertinent here, as follows:

"(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

"(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by any person to be examined and upon notice and for good cause shown,

the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

Rule 30(b) of the Federal Rules of Civil Procedure details the various actions that the Court might take upon the request of any party, none of which the Court is asked to make in these proceedings, unless the motion to vacate the notice of taking depositions be considered a motion that the depositions shall not be taken.

The Court fails to see any validity in any of the grounds stated in the motion to vacate. There is ample statutory authority for the making of rules of this Court. There is nothing in Rule 29 that limits the taking of the deposition to the confines of the District of Columbia. The very obvious reason for the taking of the depositions and a very valid one at that is that the persons whose testimony is sought to be taken cannot be reached by the process of this Court.

The Court knows of no statutory provision or any decision to the effect that the persons who take a deposition must first tender the opposite party's expenses for the taking of the deposition. As far as the 5th paragraph of the respondent's motion is concerned, if the deposition sought to be taken is not admissible, objection can be made at the time the deposition is sought to be admitted.

The Court can see no difference between these cases and litigation in other courts of the District where the taking of the depositions here involved would be considered proper, unless for a reason which has not been shown by the respondent.

For the reason stated the Court will enter an order overruling the respondent's motion to vacate.

/s/Jo. V. Morgan
Judge

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149

FILED
JUL 5 1955

ORDER

Upon consideration of the motion to vacate notice of taking deposition in the above-entitled causes, and of the memorandums filed by the parties, it is by the Court this 5th day of July, 1955,

ORDERED, That the motion to vacate notice of taking

depositions served upon the respondent by the petitioners on June 27, 1955, be, and the same is hereby overruled.

/s/Jo. V. Morgan,
Judge

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150

FILED
AUG 29 1955

MEMORANDUM OPINION CONCERNING
OBJECTION BY RESPONDENT TO
INTRODUCTION OF DEPOSITIONS.

During the hearing in this proceeding the petitioners offered in evidence the depositions of Henry G. Lahm, James Hennessy, Frank J. Murphy and Joseph D. McGraw, to which introduction the respondent objected on (a) the grounds set out in respondent's motion to vacate notice of taking depositions, filed herein on June 30, 1955, and (b) on the grounds that the matters covered by, and the evidence introduced in such depositions were immaterial to the proper disposition of the issues in this proceeding. The Court reserved its ruling on the respondent's objection. This memorandum opinion is now addressed to the motion.

151 As to the objections raised in the motion to vacate notice of taking depositions, the Court holds as it did in the memorandum concerning that motion filed herein on July 5, 1955, that is to say, it holds that such objections are without merit.

As to the ground that the matters and things developed in the depositions are immaterial, it is merely necessary to state that what the depositions sought to establish and prove was the value of the physical material employed by the various syndicates in carrying out their contracts with the petitioners relative to the comic strips, which according to the decision of the United States Court of Appeals in Washington Times-Herald, Inc. v. District of Columbia ___ U. S. App. D. C., ___, 213 F. 2d 23, is the most important and material point in the case.

For the above reasons the Court will enter an order overruling the objections to the introduction of the depositions.

/s/Jo V. Morgan,
Judge

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152

FILED
AUG 29 1955

ORDER OVERRULING OBJECTIONS TO
INTRODUCTION OF THE DEPOSITIONS

Upon consideration of the objection of the respondent to the introduction in evidence of the depositions of Henry G. Lahm, James Hennessy, Frank J. Murphy and Joseph D. McGraw during the hearing in this proceeding, and concerning which objection the Court reserved its ruling, it is by the Court this 29th day of August, 1955,

ORDERED, That said objection be and the same is overruled;
and that said depositions are received in evidence.

/s/Jo. V. Morgan,
Judge

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154

FILED
SEP 6 1955

FINDINGS OF FACTS AND OPINION

The petitioning taxpayers here claim refund of amounts paid as use taxes assessed in relation to daily features and comic strips in matrix form furnished them by syndicates on the ground that the services involved were personal, and that the tangible material was inconsequential, resulting in exemption from use taxation.

Findings of Facts

The parties have stipulated and the Court finds as follows:

"Subject to objection as to relevancy or materiality it is hereby stipulated between counsel for the Petitioners and counsel for the Respondent as follows:

155 "1. The Petitioner, The Washington Post Company, is a corporation organized under the laws of the State of Delaware with its principal office at 1515 L Street, N. W., Washington, D. C.

"2. During the period from August 1, 1949, through March 31, 1954, Petitioner, The Washington Post Company, was engaged in the business of publishing and distributing a daily newspaper in the District of Columbia and adjoining states. During the period from August 1, 1949, to March

17, 1954, this newspaper was THE WASHINGTON POST, and during the period from March 17, 1954, to the date of the filing of the petition herein, the newspaper so published and distributed was THE WASHINGTON POST AND TIMES-HERALD.

"3. The taxes in controversy in Docket No. 1494 are use taxes for the period from August 1, 1949, through March 31, 1954, in a total amount of \$3,482.34.

"These taxes were paid by Petitioner, The Washington Post Company, on amounts paid by it to Syndicates during the period mentioned for daily comic strips furnished it by the Syndicates in matrix form for publication in the newspaper THE WASHINGTON POST. Petitioner, The Washington Post Company, also paid interest on such use taxes in the amount of \$165.24 on such of the use taxes as were paid by it for the period from August 1, 1949, through May 31, 1952, and such interest is also in controversy.

"Said use taxes were paid by The Washington Post Company on the dates, in the amounts and with interest, all as specified in the following schedule, and claims for refund of such taxes and interest were filed by The Washington Post Company and denied as specified in said schedule.

Period Covered	Amount Paid and Claimed in Claim for refund		Date Paid	Date of Filing Claim for Refund	Date of Rejection of Claim for Refund
	<u>Tax</u>	<u>Interest</u>			
8/1/49 - 5/31/50	\$610.24	\$85.24	7/3/52	6/30/53	3/11/55
6/1/50 - 5/31/51	730.93	61.63	7/3/52	6/30/53	3/11/55
6/1/51 - 5/31/52	751.23	18.37	7/3/52	6/30/53	3/11/55
6/1/52 - 6/30/52	66.81		7/21/52	6/30/53	3/11/55

<u>Period Covered</u>	<u>Amount Paid and Claimed in Claim for refund</u> <u>Tax</u> <u>Interest</u>	<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
7/1/52 - 7/31/52	62.92	8/19/52	6/30/53	3/11/55
8/1/52 - 8/31/52	62.80	9/19/52	6/30/53	3/11/55
9/1/52 - 9/30/52	63.47	10/20/52	6/30/53	3/11/55
10/1/52 - 10/31/52	61.46	11/20/52	6/30/53	3/11/55
11/1/52 - 11/30/52	60.09	12/19/52	6/30/53	3/11/55
12/1/52 - 12/31/52	64.59	1/19/53	6/30/53	3/11/55
1/1/53 - 1/31/53	59.66	2/20/53	6/30/53	3/11/55
156 2/1/53 - 2/28/53	54.94	3/20/53	6/30/53	3/11/55
3/1/53 - 3/31/53	63.42	4/20/53	6/30/53	3/11/55
4/1/53 - 4/30/53	61.46	5/20/53	6/30/53	3/11/55
5/1/53 - 5/31/53	66.75	6/19/53	6/30/53	3/11/55
6/1/53 - 6/30/53	61.89	7/20/53	5/26/54	3/11/55

<u>Period Covered</u>	<u>Amount Paid and Claimed in Claim for refund</u>		<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
	<u>Tax</u>	<u>Interest</u>			
7/1/53 - 7/31/53	70.20		8/20/53	5/26/54	3/11/55
8/1/53 - 8/31/53	68.13		9/20/53	5/26/54	3/11/55
9/1/53 - 9/30/53	62.19		10/20/53	5/26/54	3/11/55
10/1/53 - 10/31/53	59.95		11/20/53	5/26/54	3/11/55
11/1/53 - 11/30/53	65.83		12/21/53	5/26/54	3/11/55
12/1/53 - 12/31/53	63.68		1/20/54	5/26/54	3/11/55
1/1/54 - 1/31/54	67.40		2/19/54	5/26/54	3/11/55
2/1/54 - 2/28/54	58.96		3/19/54	5/26/54	3/11/55
3/1/54 - 3/31/54	63.34		4/20/54	5/26/54	3/11/55
Totals	\$3,482.34	\$165.24			

"4. The photostatic copies of contracts for the purchase of features and comic strips for publication in the newspaper THE WASHINGTON POST, which have been initialed by counsel for Petitioner, The Washington Post Company, and counsel for the Respondent, are true and correct copies of the

originals of such contracts and may be received in evidence without further proof.

"5. The Petitioner, Washington Times-Herald, Inc., a Delaware corporation, was dissolved March 17, 1954.

"6. During the period from March 1, 1951, to March 17, 1954, Petitioner, Washington Times-Herald, Inc., was engaged in the business of publishing and distributing the TIMES-HERALD, a daily newspaper, in the District of Columbia and adjoining states.

157 "7. The use taxes in controversy in docket numbers 1495 and 1497 are use taxes for the periods from March 1, 1951, through January 1952 and from April 1, 1953, through March 1954 in a total amount of \$2,022.73. These taxes were paid by Petitioner, Washington Times-Herald, Inc., on amounts paid by it to Syndicates during the periods mentioned for features and comic strips furnished it by the Syndicates for publication in the newspaper, TIMES-HERALD. These taxes were paid by it on the dates and in the amounts specified in the following schedule, and claims for refund of such taxes were filed by Washington Times-Herald, Inc., and denied as specified in said schedule."

<u>Period Covered</u>	<u>Amount Paid and Claimed in Claim for Refund</u>	<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
March, 1951	\$ 41.70	4/20/51	4/17/52	3/11/55
April, 1951	120.95	5/20/51	4/17/52	3/11/55
May, 1951	85.03	6/20/51	4/17/52	3/11/55
June, 1951	104.00	7/20/51	4/17/52	3/11/55
July, 1951	96.25	8/20/51	4/17/52	3/11/55

<u>Period Covered</u>	<u>Amount Paid and Claimed in Claim for Refund</u>	<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
August, 1951	76.40	9/20/51	4/17/52	3/11/55
September, 1951	69.65	10/20/51	4/17/52	3/11/55
October, 1951	88.20	11/20/51	4/17/52	3/11/55
November, 1951	82.20	12/19/51	4/17/52	3/11/55
December, 1951	64.00 (claim for refund erroneously claimed \$66.50 instead of \$64.00)	1/18/52	4/17/52	3/11/55
January, 1952	137.40	2/19/52	4/17/52	3/11/55
April, 1953	51.60	5/20/53	5/3/54	3/11/55
May, 1953	48.90	6/18/53	5/3/54	3/11/55
June, 1953	166.00	7/20/53	5/3/54	3/11/55
July, 1953	165.10	8/20/53	5/3/54	3/11/55
August, 1953	50.50	9/20/53	5/3/54	3/11/55
September, 1953	58.50	10/20/53	5/3/54	3/11/55
October, 1953	74.00	11/19/53	5/3/54	3/11/55
November, 1953	105.20	12/28/53	5/3/54	3/11/55
December, 1953	101.70	1/20/54	5/3/54	3/11/55
January, 1954	76.85	2/20/54	5/3/54	3/11/55
February, 1954	94.60	3/30/54	5/3/54	3/11/55
March, 1954	64.00	4/20/54	5/3/54	3/11/55
Total	\$2,022.73			

"8. The photostatic copies of contracts for the purchase of features and comic strips for publication in the newspaper TIMES-HERALD, which have been initialed by counsel for Petitioner, Washington, Times-Herald, Inc., and counsel for the Respondent, are true and correct copies of the originals of such contracts and may be received in evidence without further proof.

"9. Docket number 1495, in which Washington Times-Herald, Inc., is the Petitioner, and docket number 1497, in which The Washington Post Company is the Petitioner, are petitions for the refund of the same use taxes, both parties having petitioned for a refund in order, out of an abundance of caution, that the proper party be before the Tax Court with respect to such use taxes."

The Court finds additional facts as follows:

1. Of the use taxes paid by petitioner, Washington Times-Herald, Inc., \$1,417.67 represents the use taxes paid by petitioner on the dollar amounts paid by it to syndicates for daily features furnished it in matrix form; \$554.06 represents the use taxes paid by it on the dollar amounts paid by it to syndicates for Sunday features furnished it in matrix form but as to which the matrices were never received in the District of Columbia; \$49.00 represents use taxes paid by it on the dollar amounts paid by it to syndicates for features furnished it in non-mat form, and \$2.00 represents use taxes paid by petitioner as a result of arithmetic errors in connection with its computations of use taxes to be paid on the

dollar amounts paid by it to the syndicates.

2. During the periods involved in this case, there were in force contracts between the petitioners, The Washington Post Company and Washington Times-Herald, Inc., and the syndicates for furnishing the features on which the use taxes in controversy were paid.

3. Artists furnished drawings to the syndicates. From the drawings so furnished, the syndicates made or caused to be made photo-engravings and from these, made or caused to be made matrices bearing impressions of the current sequence of the comic strips or features. The contracts referred to in paragraph 2 above granted to petitioners the right to reproduce and publish in their newspapers the work of the artists who made the drawings. The syndicates carried out their contracts with the petitioners by forwarding to the petitioners at intervals the matrices bearing the impressions of the current sequence of the strips. The petitioners used the matrices in the first of a series of operations culminating in the production of a semi-circular metal plate the size of a newspaper page from which the newspaper page containing the features, news articles and advertisements was printed.

4. A typical arrangement between a syndicate and an artist

was for the artist to receive fifty percent of the gross proceeds received from the distribution of the feature. The syndicate
159 obtained a market for the distribution of the artist's drawings. The matrices from which the drawings could be reproduced by a subscribing newspaper were distributed by the syndicates to large numbers of such newspapers.

5. The contracts between the syndicates and petitioners for the furnishing of features to petitioners contain provisions, in varying forms, excusing the syndicates from liability if the artist should fail to furnish the feature covered by the contract and providing that there would be no charge for such feature during the period of such failure.

6. In respect of The Washington Post Company and the matters and issues involved in Docket No. 1494, the syndicates furnishing the comic strip mats or matrices, the total amounts charged therefor each week, the value or sales price of the mats or matrices furnished each week and the ratio or percentage of such value or sales price to the weekly charges during the taxable period involved were as follows:

<u>Syndicate</u>	<u>Number of Features</u>	<u>Date</u>	<u>Weekly Charges</u>	<u>Value or Sales Price of Mats</u>	<u>Per- cent of Weekly Charges</u>
Chicago Tribune-New York News Syndicate, Inc.	2	8/1/49	\$50.00	\$.66	1.3
" " "	2	3/31/54	50.00	.74	1.5
United Features Syndicate	2	10/3/49	50.00	2.03	4
" " "	2	3/1/52	50.00	.99	2
" " "	2	3/1/54	50.00	.83	1.6
The McNaught Syndicate, Inc.	4	8/1/49	112.50	2.21	1.8
" " "	5	3/31/54	150.00	2.88	1.9
Post Hall Syndicate	1	8/1/49	25.00	.48	2
" " "	3	3/31/54	65.00	1.10	1.9
King Features Syndicate	8	8/1/49	196.50	2.93	1.5
" " "	4	3/31/54	160.12	1.74	1.1

7. In respect of Washington Times-Herald, Inc., and its assignee, Washington Post Company, and the matters and issues involved in Docket Nos. 1495 and 1497, the furnishing of the comic strip mats or matrices, the total amounts charged therefor each week, the value or sales price of the mats or matrices furnished each week and the ratio or percentage of such value or sales price to the weekly charges during the taxable period involved were as follows:

<u>Syndicate</u>	<u>Number of Features</u>	<u>Date</u>	<u>Weekly Charges</u>	<u>Value or Sales Price of Mats</u>	<u>Per- cent of Weekly Charges</u>
Chicago Tribune-New York News Syndicate, Inc.	6	3/1/51	\$147.50	\$1.62	1.1
" " "	9	3/31/54	232.92	2.23	1

160 <u>Syndicate</u>	Number of <u>Features</u>	<u>Date</u>	<u>Weekly Charges</u>	<u>Value of Sales Price of Mats</u>	<u>Per- cent of Weekly Charges</u>
United Features Syndicate	1	3/1/51	75.00	.23	.03
" " "	1	3/1/54	82.50	.26	.03
King Features Syndicate	29	3/1/51	485.00	14.19	3
" " "	28	3/31/54	522.50	14.44	2.8

8. On March 17, 1954, the petitioner in Docket No. 1495, Washington Times-Herald, Inc., transferred and assigned its properties to The Washington Post Company, the petitioner in Docket Nos. 1494 and 1497. Included among the properties so transferred and assigned were all right, title and interest of Washington Times-Herald, Inc., in "all choses of action, including all claims and demands and all causes of action, together with full power, including power of substitution and revocation, * * *" in the name of Washington Times-Herald, Inc., or in the name of The Washington Post Company but for the sole use of the latter "to ask, demand, sue for, ~~pro~~secute suits for, collect, receive * * * any of the same."

9. Proceedings, Docket Numbers 1494 and 1495 were filed on April 5, 1955, proceeding Docket Number 1497 was filed on May 6, 1955.

Opinion

These cases have been consolidated because they present the

same question, namely, propriety of use taxes assessed under the following circumstances.

The petitioner, The Washington Post Company is the publisher of a daily and Sunday newspaper in the District of Columbia. During the taxable period involved in its case (August 1, 1949 to March 31, 1954) it used certain mats or matrices in the District of Columbia furnished to it by several syndicates for reproduction of comic strips in its paper for a weekly charge. The same was true with respect to the petitioner, Washington Times-Herald, Inc., except that the taxable period relating to it was from March 1, 1951, to March 31, 1954.

On March 17, 1954, the petitioner, Washington Times-Herald, Inc., transferred and assigned all of its properties to the petitioner, The Washington Post Company, including "all choses in action, including all claims and demands and all causes of action", with the right in the latter's name "to ask, demand, sue for, prosecute suits for, collect, receive * * * * any of the same".

161 The physical or material value of the mats or matrices furnished the petitioners by the syndicate was in no instance in excess of four per cent of the amount charged for the services rendered petitioner under the contracts between petitioners and the

particular syndicate. The percentages ran from less than one to four per cent, which obtained in one instance only.

The petitioners rely on Washington Times-Herald, Inc., v. District of Columbia ___ U.S. App. D. C. 213 F. 2d 23, decided by the full bench of the United States Court of Appeals for the District of Columbia Circuit under facts identical with those here present, and in which Judge Miller speaking for the Court of Appeals said:

"Section 47-2701, subd. 1(b) (3) of the Code exempts from sales and use taxes 'Professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made.' An implementing Regulation provides that a sales is an 'inconsequential element' where the price of the tangible personal property is less than ten per cent of the amount charged for the services rendered. The Tax Court found as a fact that

"The value and sales price of the matrices (also known as 'mats') * * * were less than ten per cent of the amount charged for the services rendered the petitioner under the contracts [with the syndicates] * * *."

"This finding, which was disregarded by the Tax Court in its decision holding the transaction taxable, was a sufficient basis for reaching the opposite conclusion. The syndicates sold to the Times-Herald the right to reproduce one time the work of artists who make the drawings. They simply sold the professional and personal services of the artists whom they had under contract and in so doing transferred title to the mats, of inconsequential value, from which the drawings could be reproduced. The price was paid for the artists' work, i.e., for the right to reproduce the impressions on the mats, --not for the mats themselves. The newspaper

bought the creation of the artist--not the material on which it was impressed--and the right to reproduce it. Without that right, the comic strips mats would be entirely worthless.

"The transactions in question are clearly exempt under § 47-2701, subd. 1(b)(3)."

The respondent relies upon an earlier case, Meyer v. Washington Times Co., 64 App. D. C. 218, 76 F. 2d 988, (cert. den., 295 U.S. 734) which involved, among other things, the assignability of contracts between syndicates and newspaper publishers for furnishing comic strips and features similar to those furnished in these cases. It was claimed there that the contracts were for personal services. The Court of Appeals held otherwise; that the contracts were for the sale of merchandise; and that the contract for personal services was the one between the artist, who conceived the comic strip, and the syndicate.

This is what was said.

162 "It is insisted, however, that this is not strictly a contract but in the nature of a license to use and publish copyrighted material. Whatever may be the effect of such a license between the Tribune Company and the artists producing the comics in question may be disregarded, since the contract involved is not with the artists but with the Tribune Company for the sale of the merchandise to one of its customers."

This Court must and does follow the later case, in which apparently the Court of Appeals overruled or repudiated the holding

in the earlier case. Moreover, as far as the taxes assessed against Washington Times-Herald, Inc., are concerned, the doctrine of res judicata applies.

For the reasons stated the Court holds that the use taxes assessed against the petitioners were erroneously assessed and collected from them; that the action of the Assessor in denying the claims for refund filed by the petitioners was erroneous and is hereby reversed; that the petitioner, The Washington Post Company is entitled to a refund of the use taxes assessed against it for the period August 1, 1949, to March 31, 1954, plus interest thereon or portions thereof at the rate of 4 per centum per annum from the dates of the filing of claim for refund, respectively; and that the petitioner, The Washington Post Company as assignee of the petitioner Washington Times-Herald, Inc., is entitled to a refund of the use taxes assessed against Washington Times-Herald, Inc., from March 1, 1951 to March 31, 1954, plus interest thereon or portions thereof at the rate of 4 per centum per annum from the dates of the filing of claim for refund, respectively.

Decision will be entered under Rule 30.

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163

FILED
OCT 3 1955

THE WASHINGTON POST COMPANY,)

Petitioner,)

vs.)

DISTRICT OF COLUMBIA,)

Respondent.)

DOCKET NO. 1494

AMENDED DECISION

It appearing to the Court that one item of refund shown in the computation by the parties herein was omitted from the Decision entered herein on September 30, 1955, it is by the Court, on its own motion, this 3rd day of October, 1955

ADJUDGED AND DETERMINED, That the Decision entered in this cause on September 30, 1955, is hereby vacated and set aside,

AND IT IS FURTHER ADJUDGED AND DETERMINED, That the action of the Assessor in denying the claim for refund of the hereinafter mentioned use taxes and interest was erroneous and is hereby reversed,

AND IT IS FURTHER ADJUDGED AND DETERMINED, That use taxes in the amount of \$2,840.77 for the period from August 1, 1949, through May 31, 1953, were erroneously assessed against,

and collected from the petitioner; and that the petitioner is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from June 30, 1953, until the date of the payment of such refund;

AND IT IS FURTHER ADJUDGED AND DETERMINED, That interest in the amount of \$165.24 paid by the petitioner in the above use taxes, was erroneously assessed against and collected from the petitioner; and that the petitioner is entitled to a refund thereof with interest thereon at the rate of 4 per cent per annum from June 30, 1953, until the date of the payment of such refund

AND IT IS FURTHER ADJUDGED AND DETERMINED, That use taxes in the amount of \$641.57 for the period from June 1, 1953, through March 31, 1954, were erroneously assessed and collected from the petitioner; and that the petitioner is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from May 26, 1954, until the date of the payment of such refund.

/s/Jo. V. Morgan,
Judge

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175

FILED
DEC 5 1955**ORDER EXTENDING TIME FOR FILING
TRANSCRIPT OF RECORD ON REVIEW**

On this 5th day of December, 1955, the Court of its own motion, hereby extends the time for the filing of the transcript of record on review by the United States Court of Appeals for the District of Columbia Circuit until and including the 9th day of December, 1955.

/s/Jo. V. Morgan,
Judge

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177

FILED
APR 5 1955

WASHINGTON TIMES-HERALD, INC.,)

Petitioner,)

v.)

DISTRICT OF COLUMBIA,)

Respondent.)

Docket No. 1495

PETITION

The Petitioner, Washington Times-Herald, Inc., hereby appeals from the denial of claims for refund of use taxes paid by it under the provisions of the District of Columbia Use Tax Act,

Sec. 47-2701, et seq., D. C. Code (1951 ed.), and in support thereof alleges as follows:

1. This Tax Court has jurisdiction under the provisions of Secs. 47-2617, 47-2618, 47-2713, 47-2402 and 47-2413 (d) and (e) of the D. C. Code (1951 ed.) in that without any determination of a deficiency under Sec. 47-2616 of the D. C. Code (1951 ed.) Petitioner has paid use taxes which were erroneously or illegally collected and within one year after such payments filed claims for refund of such use taxes, which refund claims were rejected on March 11, 1955.

2. Petitioner is a dissolved corporation, having been organized under the laws of the State of Delaware in 1949 and dissolved March 18, 1954. Under Title 8, Section 278, of the Delaware Code, Petitioner's corporate existence continues until March 18, 1957, for 178 the purpose of prosecuting suits or proceedings. From the time of its organization until March 17, 1954, its principal office was at 1317 H Street, N. W., Washington, D. C.

3. The taxes in controversy are use taxes for the periods from March 1, 1951, through January, 1952, and from April, 1953, through March, 1954, in a total amount of \$2,025.23, paid by Petitioner in connection with contracts by which it purchased from Synidcates the right to reproduce drawings of comic strips and

other features made by artists.

4. Said use taxes were paid by Petitioner on the dates hereinafter mentioned, in the amounts hereinafter specified, and thereafter, on the dates hereinafter specified, Petitioner filed claims for refund of the amounts so paid, which claims for refund were denied on the dates hereinafter specified.

<u>Period Covered</u>	<u>Amount Paid</u>	<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
March, 1951	\$ 41.70	4/20/51	4/17/52	3/11/55
April, 1951	120.95	5/20/51	4/17/52	3/11/55
May, 1951	85.03	6/20/51	4/17/52	3/11/55
June, 1951	104.00	7/20/51	4/17/52	3/11/55
July, 1951	96.25	8/20/51	4/17/52	3/11/55
August, 1951	76.40	9/20/51	4/17/52	3/11/55
September, 1951	69.65	10/20/51	4/17/52	3/11/55
October, 1951	88.20	11/20/51	4/17/52	3/11/55
November, 1951	82.20	12/19/51	4/17/52	3/11/55
December, 1951	66.50	1/18/52	4/17/52	3/11/55
January, 1952	137.40	2/19/52	4/17/52	3/11/55

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<u>Period Covered</u>	<u>Amount Paid</u>	<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
April, 1953	\$ 51.60	5/20/53	5/3/54	3/11/55
May, 1953	48.90	6/18/53	5/3/54	3/11/55
June, 1953	166.00	7/20/53	5/3/54	3/11/55
July, 1953	165.10	8/20/53	5/3/54	3/11/55
August, 1953	50.50	9/20/53	5/3/54	3/11/55
September, 1953	58.50	10/20/53	5/3/54	3/11/55
October, 1953	74.00	11/19/53	5/3/54	3/11/55
November, 1953	105.20	12/28/53	5/3/54	3/11/55
December, 1953	101.70	1/20/54	5/3/54	3/11/55
January, 1954	76.85	2/20/54	5/3/54	3/11/55
February, 1954	94.60	3/20/54	5/3/54	3/11/55
March, 1954	64.00	4/20/54	5/3/54	3/11/55
Total	\$2,025.23			

5. The following errors were committed in denying the claims for refund described above:

- (a) The transactions were professional or personal service transactions which involved sales as an inconsequential element for which no separate

charges were made and which were thus exempt under Sec. 47-2701 1(b) (3) of the D. C. Code (1951 ed.); or

(b) The transactions involved no use or consumption of any tangible personal property or purchase or sale of services and consequently were not taxable under Sec. 47-2702 of the D. C. Code (1951 ed.).

180 Accordingly, the taxes were erroneously collected and the refund claims should have been granted.

6. The facts upon which the Petitioner relies as the basis for this proceeding are as follows:

(a) During the period from March 1, 1951, to March 17, 1954, Petitioner was engaged in the business of publishing and distributing the **TIMES-HERALD**, a daily newspaper, in the District of Columbia and adjoining states.

(b) During the period from March 1, 1951, to March 17, 1954, Petitioner received its supply of comic strips and other features from Syndicates pursuant to contracts with such Syndicates.

(c) By these contracts the Syndicates sold to

Petitioner the right to reproduce in the future in its newspaper the work of the artists who made the drawings comprising the comic strips and other features. In order to facilitate Petitioner's reproduction of the drawings, the Syndicates furnished the drawings to Petitioner in the form of fiber matrices bearing impressions of the drawings. The price Petitioner paid to the Syndicates were paid for the right to reproduce the impressions on the matrices and not for the matrices, which were of inconsequential value as compared to the artists' creation and the right to reproduce the creation.

(d) The prices paid by Petitioner under said contracts were greatly in excess of the value of blank fiber matrices, being, with respect to each feature,
181 much more than ten times the value of the fiber matrix with no artist's impression upon it.

WHEREFORE, Petitioner prays that this Tax Court hear this proceeding and determine that the use taxes so paid by Petitioner were erroneously collected, that the claims for refund so denied should have been granted, and that Petitioner is entitled to

a refund of the taxes so paid with interest thereon, as provided by law, from the respective dates of filing the claims for refund.

WASHINGTON TIMES-HERALD, INC.

By: C. C. BOYSEN
Secretary

1515 L Street, N. W.
Washington, D. C.

* * *

183 DISTRICT OF COLUMBIA TAX COURT

WASHINGTON TIMES-HERALD, INC.	)	
	)	
Petitioner,	)	
	)	
vs.	)	DOCKET NO. 1495
	)	
DISTRICT OF COLUMBIA,	)	
	)	
Respondent.	)	

DOCKET

Date	Proceedings	Memorandum
1955		Use Taxes \$2,025.23
April 5	Pet. filed. TP., AA., & CC., served.	
May 4	Hearing set for May 26. TP., CC., & AA., served.	
" 19	Mot to consolidate for hearing and continuance - Granted - Copies served AA. TP & CC.	

Date	Proceedings	Memorandum
Jun 3	Hearing set for Jun 27. All parties served.	
" 15	Petitioner's mot for continuance - granted to July 11 - all parties served.	
June 30	Respondent motion to vacate notice of taking depositions.	
July 5	Opposition to mot to vacate notice of taking of depositions. Memo. concerning motion to vacate notice of taking depositions - Order	
July 11	Entry of appearance - John B. Marshall	
" "	Stipulation filed by Petitioner - Hearing George C. Updegraff for District.	
July 25	Memo. with respect to proper party to petition Tax Court for Refund of Taxes paid by Washington Times-Herald. Request for Findings of Fact and Conclusions of Law Copies served CC.	
Aug 9	Respondent's objections to petitioners' proposed findings of fact and conclusion of law - Service.	
" 29	Memo. Opinion Concerning Objection by Respondent to Introduction of the Depositions. Order Overruling Objections to Introduction of the Depositions. AA., CC., & TP., served.	
Sept 6	Findings of Facts & Opinion AA., CC., & TP., served.	
" 30	Decision	
Oct 26	Petition for Review filed by District of Columbia. Statement of Points - Service.	
" 28	Designation of Record - Certificate of Service.	
Nov 3	Designation of Additional Portions of Record. Certificate of Service.	
Dec 5	Order Extending Time for Filing Transcript of Record on Review. Order for Delivery of Original Exhibits. Copies mailed attorney for petitioner - Attorney for respondent.	

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DISTRICT OF COLUMBIA TAX COURT

FILED
SEP 30 1955

WASHINGTON TIMES-HERALD, INC.,)

Petitioner,)

vs.)

DOCKET NO. 1495

DISTRICT OF COLUMBIA,)

Respondent.)

THE WASHINGTON POST COMPANY,)

Petitioner,)

vs.)

DOCKET NO. 1497

DISTRICT OF COLUMBIA,)

Respondent.)

DECISION

This proceeding came on to be heard upon the petition filed herein and upon consideration thereof and of the evidence adduced at the hearing on said petition and of the computation under Rule 30, filed by the parties, it is by the Court this 30th day of September, 1955

ADJUDGED AND DETERMINED, That the action of the Assessor in denying the claims for refund of the hereinafter mentioned

use taxes was erroneous and is hereby reversed;

AND IT IS FURTHER ADJUDGED AND DETERMINED, That use taxes in the amount of \$965.78 for the period from March 1, 1951, through January 31, 1952, were erroneously assessed against, and collected from the Petitioner, Washington Times-Herald, Inc., and that the petitioner, The Washington Post Company, as the assignee of Washington Times-Herald, Inc., is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from April 17, 1952, until the date of the payment of such refund;

AND IT IS FURTHER ADJUDGED AND DETERMINED, That use taxes in the amount of \$1,056.95 for the period from April 1, 1953, through March 31, 1954, were erroneously assessed against, and collected from the petitioner, Washington Times-Herald, Inc.; 187 and that the petitioner, The Washington Post Company, as the assignee of Washington Times-Herald, Inc., is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from May 3, 1954, until the date of the payment of such refund.

/s/ Jo. V. Morgan,
Judge

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DISTRICT OF COLUMBIA TAX COURT

FILED
MAY 6 1955

THE WASHINGTON POST COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 1497
	)	
DISTRICT OF COLUMBIA,	)	
	)	
Respondent.	)	

PETITION

The petitioner, The Washington Post Company, hereby appeals from the denial of claims for refund of use taxes paid by its predecessor, Washington Times-Herald, Inc., under the provisions of the District of Columbia Use Tax Act, Sec. 47-2701, et seq., D. C. Code (1951 ed.), and in support thereof alleges as follows:

1. This Tax Court has jurisdiction under the provisions of Secs. 47-2617, 47-2618, 47-2713, 47-2402 and 47-2413 (d) and (e) of the D. C. Code (1951 ed.) in that without any determination of a deficiency under Sec. 47-2616 of the D. C. Code (1951 ed.) Petitioner's predecessor, Washington Times-Herald, Inc., has paid use taxes which were erroneously or illegally collected and within one year after such payments filed claims for refund of such use taxes, which refund claims were rejected on March 11, 1955.

2. On March 17, 1954, Petitioner's predecessor, Washington Times-Herald, Inc., assigned to Petitioner all of the right, title and interest of said predecessor, Washington Times-Herald, Inc., in all claims and choses in action together with full power, in the name of either Washington Times-Herald, Inc. or The Washington Post Company, to demand and sue for any of the same. On March 18, 1954, Petitioner's predecessor, Washington Times-Herald, Inc., was dissolved under the laws of the State of Delaware, under which it had been organized in 1949.

3. The taxes in controversy are use taxes for the periods from March 1, 1951, through January, 1952, and from April, 1953, through March, 1954, in a total amount of \$2,025.23, paid by Petitioner's predecessor, Washington Times-Herald, Inc., in connection with contracts by which its said predecessor purchased from Syndicates the right to reproduce drawings of comic strips and other features made by artists.

4. Said use taxes were paid by Petitioner's predecessor, Washington Times-Herald, Inc., on the dates hereinafter mentioned, in the amounts hereinafter specified, and thereafter, on the dates hereinafter specified, Petitioner's predecessor, Washington Times-Herald, Inc., filed claims for refund of the amounts so paid, which

claims for refund were denied on the dates hereinafter specified.

<u>Period Covered</u>	<u>Amount Paid</u>	<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
March, 1951	\$ 41.70	4/20/51	4/17/52	3/11/55
April, 1951	120.95	5/20/51	4/17/52	3/11/55
May, 1951	85.03	6/20/51	4/17/52	3/11/55
June, 1951	104.00	7/20/51	4/17/52	3/11/55
July, 1951	96.25	8/20/51	4/17/52	3/11/55
August, 1951	76.40	9/20/51	4/17/52	3/11/55
September, 1951	69.65	10/20/51	4/17/52	3/11/55
October, 1951	88.20	11/20/51	4/17/52	3/11/55
November, 1951	82.20	12/19/51	4/17/52	3/11/55
December, 1951	66.50	1/18/52	4/17/52	3/11/55
January, 1952	137.40	2/19/52	4/17/52	3/11/55
April, 1953	51.60	5/20/53	5/3/54	3/11/55
May, 1953	48.90	6/18/53	5/3/54	3/11/55
June, 1953	166.00	7/20/53	5/3/54	3/11/55
July, 1953	165.10	8/20/53	5/3/54	3/11/55
August, 1953	50.50	9/20/53	5/3/54	3/11/55
September, 1953	58.50	10/20/53	5/3/54	3/11/55

<u>Period Covered</u>	<u>Amount Paid</u>	<u>Date Paid</u>	<u>Date of Filing Claim for Refund</u>	<u>Date of Rejection of Claim for Refund</u>
October, 1953	74.00	11/19/53	5/3/54	3/11/55
November, 1953	105.20	12/28/53	5/3/54	3/11/55
December, 1953	101.70	1/20/54	5/3/54	3/11/55
January, 1954	76.85	2/20/54	5/3/54	3/11/55
February, 1954	94.60	3/20/54	5/3/54	3/11/55
March, 1954	64.00	4/20/54	5/3/54	3/11/55
Total	\$2,025.23			

5. The following errors were committed in denying the claims for refund described above:

(a) The transactions were professional or personal service transactions which involved sales as an inconsequential element for which no separate charges were made and which were thus exempt under Sec. 47-2701 1(b)(3) of the D. C. Code (1951 ed.);

or

(b) The transactions involved no use or consumption of any tangible personal property or purchase or sale of services and consequently were not taxable under Sec. 47-2702 of the D. C. Code (1951 ed.).

Accordingly, the taxes were erroneously collected and the refund claims should have been granted.

6. The facts upon which the Petitioner relies as the basis for this proceeding are as follows:

(a) During the period from March 1, 1951, to March 17, 1954, Petitioner's predecessor, Washington Times-Herald, Inc., was engaged in the business of publishing and distributing the TIMES-HERALD, a daily newspaper, in the District of Columbia and adjoining states.

(b) During the period from March 1, 1951, to March 17, 1954, Petitioner's predecessor, Washington Times-Herald, Inc., received its supply of comic strips and other features from Syndicates pursuant to contracts with such Syndicates.

(c) By these contracts that Syndicates sold to Petitioner's predecessor, Washington Times-Herald, Inc., the right to reproduce in the future in its newspaper the work of the artists who made the drawings comprising the comic strips and other features. In order to facilitate Petitioner's said predecessor's reproduction

of the drawings, the Syndicates furnished the drawings to said predecessor in the form of fiber matrices bearing impressions of the drawings. The price said predecessor paid to the
197 Syndicates was paid for the right to reproduce the impressions on the matrices and not for the matrices, which were of inconsequential value as compared to the artists' creation and the right to reproduce the creation.

(d) The prices paid by Petitioner's predecessor, Washington Times-Herald, Inc., under said contracts were greatly in excess of the value of blank fiber matrices, being, with respect to each feature, much more than ten times the value of the fiber matrix with no artist's impression upon it.

WHEREFORE, Petitioner prays that this Tax Court hear this proceeding and determine that the use taxes so paid by Petitioner's predecessor, Washington Times-Herald, Inc., were erroneously collected, that the claims for refund so denied should have been

granted, and that Petitioner, as successor to its predecessor, Washington Times-Herald, Inc., is entitled to a refund of the taxes so paid with interest thereon, as provided by law, from the respective dates of filing the claims for refund.

THE WASHINGTON POST COMPANY

By: /s/C. C. Boysen
 Secretary
 1515 L Street, N. W.
 Washington, D. C.

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DISTRICT OF COLUMBIA TAX COURT

THE WASHINGTON POST COMPANY,)

Petitioner,)

vs.)

DISTRICT OF COLUMBIA,)

Respondent.)

DOCKET NO. 1497

DOCKET

Date	Proceedings	Memorandum
1955		Use Taxes \$2,022.23
May 6	Pet. filed. TP. notified. AA., & CC., served.	

Date	Proceedings	Memorandum
May 19	Pet. mot for consolidate of hearing and continuance - Granted - Copies served CC., TP., & AA.	
June 3	Hearing set for June 27. All parties served.	
June 15	Pet's mot for continuance - Granted to July 11 - all parties served.	
" 30	Resp. motion to vacate notice of taking deposition.	
July 5	Opposition to mot to vacate notice of taking depositions.	
" 11	Entry of Appearance John B. Marshall.	
" "	Stipulation filed by Petitioner.	
July 25	Hearing - George C. Updegraff for District. Memo. with respect to proper party to petition Tax Court for refund of taxes paid by Washington Times-Herald. Request for Findings of Fact and Conclusions of Law. Copies served CC.	
Aug 9	Respondent's objections to petitioners' proposed findings of fact and concl. of law. Service.	
" 29	Memo. Opinion Concerning Objection to Introduction of the Depositions. Order overruling Objections to Introduction of the Depositions. AA., CC., & TP., served.	
Sept 6	Findings of Facts & Opinion AA., CC., & TP served.	
" 30	Decision	
Oct 26	Petition for Review filed by District of Columbia Statement of Points on Review - Certificate of Service - Designation of Record.	
Nov 3	Designation of additional portions of record. Certificate of Service.	
Dec 5	Order Extending Time for Filing Transcript of Record on Review. Order for Delivery of Original Exhibits. Copies mailed attorney for petitioner - Attorney for respondent.	

Pet. Ex. 56

THIS AGREEMENT, made in duplicate this 24th day of November, 1948, between KING FEATURES SYNDICATE, party of the first part, hereinafter referred to as the "Syndicate", and THE WASHINGTON POST COMPANY, a corporation, party of the second part, hereinafter referred to as the "Subscriber".

WITNESSETH: The Syndicate and the Subscriber, in consideration of the mutual promises of each other hereinafter contained, hereby agree as follows:

(1) The Syndicate will furnish to the Subscriber, daily only, beginning with the release of November 15, 1948, the feature known as "MERRY MENAGERIE".

(2) The Syndicate will deliver the said feature in proof and matrix form at the office of the Subscriber in Washington, D. C., or such other place as the Subscriber may from time to time designate, in ample time prior to each release date.

(3) The Subscriber shall have the exclusive right to publish the said feature in the District of Columbia and the adjacent area within a radius of sixty (60) miles excluding the city of Baltimore, Maryland. Upon the termination of this agreement, all publication rights to the material furnished hereunder shall cease.

(4) The Subscriber will pay the Syndicate for the said feature at the rate of Twenty Dollars (\$20.00) per week. Such weekly rate shall become earned at the end of each week, and all sums earned during each month shall be paid not later than the fifteenth of the following month.

(5) The Subscriber will publish the copyright and credit lines designated by the Syndicate and will conform to the release dates fixed by the Syndicate.

(6) The Syndicate shall not be responsible if, by reason of illness or other cause beyond its control, any author or artist shall fail to furnish the feature covered by this agreement, but the amount to be paid hereunder shall be adjusted to the end that there shall be no charge for such feature during the period of such failure; and if the Subscriber, by reason of any cause beyond its control, shall be unable to make use of the feature covered by this agreement, similar adjustment shall be made for the period of such inability.

(7) This agreement shall remain in force for a period of one year beginning November 15, 1948, and ending November 14, 1949, and thereafter shall renew itself continuously for periods of one year each unless either party notifies the other, in writing,

at least ninety (90) days before the beginning of the first renewal period, or of any subsequent renewal period, of its election to terminate this agreement. If such notice is given, this agreement shall terminate at the beginning of the next renewal period which would have commenced thereafter; otherwise it shall continue in full force and effect.

(8) This agreement shall be assignable by the Subscriber but no such assignment shall relieve the Subscriber of its liabilities hereunder.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate on the day and year first above written.

KING FEATURES SYNDICATE

By: /S/

THE WASHINGTON POST COMPANY

By: /S/

Pet. Ex. 58a

AGREEMENT, made in duplicate this twenty-fifth day of January, 1937, between KING FEATURES SYNDICATE, INC., party of the first part, hereinafter referred to as the "Syndicate", and EUGENE MEYER & CO., a partnership doing business under the name The Washington Post, party of the second part, hereinafter referred to as the "Subscriber".

WITNESSETH: The Syndicate and the Subscriber, in consideration of the mutual promises of each other hereinafter contained, hereby agree as follows:

(1) The Syndicate will furnish the feature "G-MEN" to the Subscriber, daily only, six releases per week, beginning with the release of February 8, 1937.

(2) The Syndicate will furnish the feature "ACE DRUMMOND" to the Subscriber, Sunday only, one release per week, beginning with the release of Sunday, February 14, 1937.

(3) The Syndicate agrees to deliver to the Subscriber the above described features in matrix form and agrees to make deliveries thereof at the office of the Subscriber in Washington, D. C., or such other place as the Subscriber may designate. The Syndicate also agrees that such deliveries will be made in ample time for

publication of said features on their release dates and that such deliveries will be made in ample time to permit of a continuous publication of the features by the Subscriber.

(4) The Syndicate agrees that the Subscriber shall have the exclusive right to publish said features in the District of Columbia and adjacent area within a radius of sixty miles, excluding the city of Baltimore, Maryland.

(5) The Subscriber agrees to pay for the feature "G-MEN" at the rate of Twenty-five (25) Dollars per week, beginning February 8, 1937, and for the feature "ACE DRUMMOND" at the rate of Twenty (20) Dollars per week, beginning February 14, 1937. Said weekly rates shall become earned at the end of each week and all sums earned during each month shall be paid not later than the fifteenth of the following month.

(6) The Subscriber agrees that upon termination of this agreement all publication rights to the material furnished hereunder shall cease.

(7) The Subscriber agrees that the Syndicate shall not be responsible, if by reason of illness or other cause beyond the control of the Syndicate, any author or artist shall fail to furnish the features covered by this agreement; provided, however, that in the event of

such failure an appropriate adjustment shall be made in the weekly rate specified in paragraph (5).

(8) The Subscriber agrees to publish the copyright and credit lines designated by the Syndicate and to conform to the release dates fixed by the Syndicate.

(9) This agreement shall remain in force for a period of ninety (90) days beginning February 8, 1937 and thereafter until terminated by either party by not less than ninety days' written notice to the other.

(10) This agreement shall be assignable by the Subscriber but no such assignment shall relieve the Subscriber of its liabilities hereunder.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate on the day and year first above written.

KING FEATURES SYNDICATE, INC.

By: /S/ _____

Title

EUGENE MEYER & CO., doing
business under the name The Wash-
ington Post

By: /S/ _____
Assistant Comptroller

Pet. Ex. 58b

March 27, 1946

King Features Syndicate, Inc.
235 East 45th Street
New York 17, N. Y.

Gentlemen:

You are now furnishing us under our agreement dated January 25, 1937 the Sunday Only feature PRINCE VALIANT and the Daily Only feature DONALD DUCK. This agreement originally covered the features "G-Man" and "Ace Drummond", but "Inspector Wade" was substituted for "G-Man" and "Prince Valiant" was substituted for "Ace Drummond". Later "Donald Duck" was substituted for "Inspector Wade". Paragraph (5) of that agreement, as amended, provides for payment for the PRINCE VALIANT feature at the rate of \$25.00 per week, and for payment of the DONALD DUCK feature at the rate of \$30.00 per week.

In accordance with the conversation had with Mr. Bernie Behrman on March 26, 1946, it is agreed that, effective April 15, 1946, the rate for the PRINCE VALIANT feature shall be increased from \$25.00 per week to \$27.50 per week. The rate for the daily DONALD DUCK feature remains unchanged. Paragraph (5) of our said January 25, 1937 agreement, as amended, shall thereupon read as follows:

"The Subscriber agrees to pay for the feature "DONALD DUCK" at the rate of Thirty Dollars (\$30.00) per week, and for the feature "PRINCE VALIANT" at the rate of Twenty Seven Dollars and Fifty Cents (\$27.50) per week. Said weekly rates shall become earned at the end of each week and all sums earned during each month shall be paid not later than the fifteenth of the following month."

In order that our files may be complete we shall appreciate it if you will acknowledge the foregoing by signing in the space pro-

vided therefor on the attached carbon copy of this letter and return it to us for our files.

Very truly yours,

/S/ C. C. BOYSEN

Business Manager

Acknowledged this 3rd day of April 1946

KING FEATURES SYNDICATE, INC.

By: /S/
General Sales Manager
(Title)

Pet. Ex. 81

AGREEMENT between NEW YORK TRIBUNE INC., hereinafter called the "Syndicate", and EUGENE MEYER & CO., owner and publisher of THE WASHINGTON POST, a newspaper published at Washington, D. C., hereinafter called the "Newspaper":

1. During the period of five years beginning June 14, 1938, and thereafter until the expiration of three months after written notice of termination shall have been given by either party to the other, the Syndicate shall furnish the Newspaper, in ample time prior to release dates, at the following rate and upon the following terms and conditions, the Syndicate's Blanket Service of syndicate features which at the date hereof consist of those listed in the annexed schedule marked "Schedule A". If, however, the Syndicate shall be in a position to deliver to the Newspaper the Syndicate's Blanket Service prior to June 14, 1938, it shall give the Newspaper not less than ten days' notice in writing to that effect, and in such case the term of this agreement shall commence upon the expiration of such notice.

2. This service also entitles the Newspaper to first option in its territory upon any new features which the Syndicate may develop or acquire. If such features are of usual run, or customary substi-

tutions, they will be included hereunder without additional charge; but if they are of unusual merit, or of exceptional and unusual cost, the Syndicate shall be entitled to ask a fair price therefor in taking into consideration the significance of the City of Washington, in addition to the rate stated herein, in which event the Newspaper shall have the option to accept or reject such features of unusual merit, or of exceptional and unusual cost. If at any time during the continuation of this agreement the Walter Lippmann column is released for publication in the Newspaper's territory as defined herein, such column shall be included hereunder without additional charge.

3. News reports originating in Washington, D. C. will be made available to the Newspaper by the Washington Bureau of the New York Herald Tribune. Other current news reports (including current foreign cables), and such special articles and features included in the Syndicate's Blanket Service, as may be specified by the Newspaper from time to time, will be transmitted promptly to the Newspaper from New York City by telegraph, utilizing so far as possible the wire facilities of the New York Herald Tribune, and the Newspaper will reimburse the Syndicate for the out-of-pocket expense incurred for such transmission. All other material

included in the Syndicate's Blanket Service will be mailed to the Newspaper at Washington, D. C., in proof or matrix form, and the Newspaper will reimburse the Syndicate for the expense of postage.

4. Commencing June 14, 1938, or earlier as provided in Paragraph 1 hereof, the Newspaper shall pay the Syndicate weekly at the rate of Three Hundred and Fifty Dollars (\$350.00) per week, plus postage and plus the expense of telegraphic transmission of news reports and special articles and features as provided in Paragraph 3 hereof. So long as the Syndicate's Blanket Service shall remain substantially the same as above described, give and take, the said weekly rate shall remain unchanged; if, however, there should be material deterioration in such Service as the result of substitutions or otherwise, appropriate adjustment shall be made in the weekly rate.

5. This service is for exclusive use of the Newspaper in its territory which, for the purpose of this agreement, means the District of Columbia and the adjacent area within a radius of sixty miles, excluding the City of Baltimore, Maryland. The Newspaper shall not publish, or cause or allow publication of, any features in advance of release date set by the Syndicate. The Newspaper shall

not use, or cause or allow use of, any feature except for one publication in its newspaper, and shall not sell, or otherwise dispose of, any feature furnished without written consent of the Syndicate.

Termination of this agreement shall end all rights of the Newspaper to use of matter furnished hereunder.

6. Nothing herein contained shall obligate the Syndicate to furnish matter which, because of copyright by others or for any other reason, it has no right to sell; and the obligations of the Syndicate hereunder are subject to rules now or hereafter in force of The Associated Press and of any other organization of which New York Tribune Inc. or its newspaper, New York Herald Tribune, is now or hereafter may become a member or client.

7. The Newspaper shall print, in connection with all copyrighted and/or trademarked matter, a copyright notice and/or notice of trademark registration, as the case may be, in form required or authorized by law, giving the name of the copyright and/or trademark proprietor.

8. This agreement shall be assignable by the Newspaper but no such assignment shall relieve it of its liabilities hereunder.

9. This agreement shall not be binding until accepted hereon in writing by the President or Vice President of the Syndicate at New

York City. The foregoing provisions hereof constitute the whole agreement and no oral modifications or additions shall be binding.

DATED, New York City, March 10 1938

ACCEPTED, New York City,

March 10 1938.

EUGENE MEYER & CO.

By /S/
Comptroller

NEW YORK TRIBUNE INC.

By /S/
Vice President

SCHEDULE ACOMMENTATORS

Dorothy Thompson
 Mark Sullivan
 George Sokolsky

SUNDAY COMICS

Mr. and Mrs.	S-H*
The Timid Soul	S-H
Betty	S
Pa's Son-in-law	S
Peter Rabbit	S
Clarence	S
Skeets	S
Terry	H
Peter Piltdown	H

*S-Standard page

*H-Half page

WEEKDAY COMICS

H. T. Webster
 Mr. and Mrs.
 Pa's Son-in-law

DAILY FEATURES

Daily Editorial Cartoons
 Dinner Menus
 Books - Gannett's reviews

Sport Column - Richards Vidmer
 Bridge article
 Crossword Puzzles
 Fashions
 Burgess' Nature Stories
 News - Full News Service

ONCE A WEEK FEATURES

Humor - Weare Holbrook
 Theatres - Richard Watts
 "This New York" - Lucius Beebe
 Society - Howard White
 Homemaking - Complete Home
 Institute service, including
 recipes and appliance news
 Books - 6 tabloid pages, reviews
 and articles
 Gardens - Putz' "Garden Note-
 book"
 Men's Fashions - illustrated
 Science
 Stamps - news of stamp world
 Puzzles - Crossword and
 Cryptograms
 Beauty - Martha Leavitt
 Fashions

AGREEMENT, made this 18th day of May, 1943, in the City of New York, between KING FEATURES SYNDICATE, INC., (hereinafter called "Syndicate"), party of the first part, and THE WASHINGTON TIMES-HERALD, (hereinafter called "Publisher"), owner and publisher of the newspaper mentioned below, published in the City of Washington, District of Columbia, party of the second part:

WITNESSETH :

FIRST: The Syndicate hereby agrees to deliver to the Publisher, and the Publisher agrees to accept from the Syndicate, in proof or matrix form -

DAILY EXCEPT SUNDAY COMICS

Brick Bradford
Bringing up Father
Barney Google
Toots and Casper
Tillie the Toiler
Little Miss Muffet
Thimble Theatre-Starring
Popeye
Little Annie Rooney
Tim Tyler's Luck
The Lone Ranger
Elsa Poppin
Flash Gordon

Skippy
Blondie
Mandrake the Magician
Henry
Room and Board
They'll do it Every Time
Secret Agent X-9
The Phantom
Radio Patrol
Mickey Mouse
Cuties
Private Buck

SUNDAY COMICS

Mandrake the Magician
Radio Patrol
Krazy Kat
Polly and Her Pals
Mickey Mouse

MISCELLANEOUS FEATURES

CP Crossword Puzzle
 Adele Garrison
 Beatrice Fairfax
 Odd Facts & Words of Wise Men
 Half Tone Fashions
 Believe it Or Not by Ripley
 Bugs Baer's Box
 What's The Answer
 Mme. Qui Vive beauty articles
 Good Manners
 Helen Rowland
 Listen World by Elsie Robinson
 Harrison Carroll
 Jenkins
 Louis Sobol
 Your Individual Horoscope
 Dorothy Kilgallen's column
 Puzzle Page
 Looking at Life
 On the Side by E. V. Durling

each for one publication by the Publisher in "Around the Clock" editions of the newspaper known as Washington Times-Herald and for no other use or purpose for the term of five (5) years beginning on the first day of January, 1944; and shall thereafter renew itself at the rate last in force for like periods unless either party sends the other by registered mail, on or before the July first preceding the expiration date of the original term or any renewal term, notice of intention to terminate this agreement.

SECOND: The Publisher agrees to pay for the aforementioned service, to the Syndicate, at the latter's principal place of business, throughout the life of this agreement, at the rate of: Four Hundred Twenty dollars (\$420.00) per week in advance and postage, payable weekly; that upon default in any payment, the Syndicate may, upon failure of the Publisher to make such payments within six (6) days from the date of notice thereof sent to the Publisher by the Syndicate by registered mail, terminate this agreement and furnish no further service to the Publisher; but such termination shall not relieve the

Publisher from any liability hereunder. The failure of the Syndicate to insist upon prompt payment, as in the aforesaid, shall not be construed as a waiver or relinquishment for the future of the foregoing covenant on the part of the Publisher to be kept and performed.

THIRD: As a condition hereof the Publisher agrees that all publications hereby allowed shall have duly affixed thereto notice of copyright as prescribed by law and the Publisher further agrees to carry upon such publications such copyright notice and Syndicate credit line as the Syndicate may from time to time designate. The Publisher will not publish or cause to be published in advance of release dates as fixed by the Syndicate any of the matter hereinabove described; and the Publisher agrees to deliver to the Syndicate, free of charge, at least one copy of the "Around the Clock" issue of the Washington Times-Herald; that it will not permit any person, firm or corporation to publish, or otherwise use, any of the matter hereinabove described, without obtaining in each instance the written consent of the Syndicate.

FOURTH: The Syndicate shall not be liable for failure to furnish any or all of the matter hereinabove described, if such failure be due to strikes, fire, floods, delay in or failure of postal service, omission, neglect or refusal on the part of the writers or artists to deliver copy, drawings or cartoons, or to any other cause or causes beyond the Syndicate's control. It is hereby further agreed that Syndicate shall in no event be liable to the Publisher, or to those claiming under or from the Publisher, for any loss, liability, damage or expense which the Publisher may incur, sustain, pay or be compelled to pay by reason of (a) the copying for publication or (b) the publication or sale of any matter or material furnished or delivered hereunder to the Publisher by the Syndicate. Should any elements listed in this contract disappear from the Syndicate's list, the Syndicate agrees to permit the Publisher to select a substitute from its list of available features, provided the cost of such substitute shall not exceed the amount agreed to be paid for the feature replaced, in which event the Publisher shall pay the amount of such excess. In the event said substitution is not made by the Publisher the Syndicate agrees to give the Publisher a reduction in the exact amount allocated to such feature in the schedule of allocations included in this agreement.

FIFTH: The Syndicate agrees to permit the Publisher to exchange any feature covered under this contract for a feature of comparable value from the Syndicate's list of available features.

SIXTH: The Syndicate agrees to grant the Publisher exclusive territorial rights on the features specified herein in the District of Columbia and within a radius of sixty miles from Washington, D. C. into the State of Virginia. It is understood and agreed that any sales made by the Syndicate within this territory as of the date of this contract are not to be affected.

SEVENTH: The Syndicate agrees to give the Publisher first opportunity to purchase any new feature developed by it, and the Publisher agrees to give the Syndicate either its declination or acceptance within forty-eight (48) hours after the first offering of any new feature. In the event the Syndicate has received no response, within the forty-eight (48) hours, it becomes the privilege of the Syndicate to offer this feature elsewhere in the territory, including Washington, D. C.

EIGHTH: The Publisher covenants and agrees that it will not give or sell to any person, firm or corporation, any of the aforesaid articles, pictures, comics or features or anything that may be furnished to it by the Syndicate, as hereinbefore provided, without the consent in writing first obtained by the Publisher from the Syndicate, and the Publisher further covenants and agrees that the termination of this contract shall end and terminate all rights of publication or of other use of all articles, pictures, comics or features delivered hereunder.

NINTH: Each of the foregoing stipulations and covenants on the part of the Publisher to be kept, observed and/or performed is of the essence of this agreement.

TENTH: If, during the term of this contract, the ownership of the aforesaid newspaper be changed, either by way of sale or otherwise, then this contract and the rights hereunder may be assigned to the purchaser or purchasers or transferee or transferees thereof, provided the Publisher's assignee or successor in interest agrees in writing to assume performance of all the terms and conditions contained herein.

ELEVENTH: All notices to be given hereunder shall be in writing and sent by registered mail to the King Features Syndicate, Inc., 235 East 45th Street, New York City, New York, and to the Washington Times-Herald, 1317 H Street, N. W., Washington, D. C. Such addresses may be changed by either party giving to the other notice of such change by registered mail sent to the above address, whereupon such changed address shall be substituted for the one above indicated.

TWELFTH: The entire agreement of the parties is hereinabove set forth. This contract supersedes all previous agreements between the parties hereto appertaining to the materials mentioned herein.

Witness:

KING FEATURES SYNDICATE, INC.,

/S/

By /S/

Witness:

THE WASHINGTON TIMES-HERALD,

/S/

By /S/

THE TIMES HERALD, INC.
WASHINGTON, D. C.

Memorandum of agreement entered into between CHICAGO TRIBUNE-NEW YORK NEWS SYNDICATE, INC., a Delaware corporation, hereinafter called the "PUBLISHER" and the undersigned corporation, firm or individual, hereinafter called the "SUBSCRIBER," publisher of the Times-Herald, hereinafter called the "newspaper."

WITNESSETH: For and in consideration of the sum of \$1.00 by each of the parties hereto the other in hand paid, receipt whereof is acknowledged, each of the parties hereto covenants and agrees with the other as follows:

FIRST: The PUBLISHER will furnish f. o. b. each week to the SUBSCRIBER in proof or matrix form, and the SUBSCRIBER will accept and regularly publish in its said newspaper the following newspaper features, viz:

	at \$	per week:
AS SHOWN ON ATTACHED SHEET	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:

for the term of three years beginning on the 1st day of July, 1949, and thereafter until either party has given to the other ninety (90) days' notice in writing of its election to terminate this contract; said notice may be given ninety days prior to the end of the above described term, or at any time thereafter, but shall not effect a termination of the contract until the expiration of ninety days after the giving of said notice. In the event that, for any reason, the PUBLISHER shall be unable to furnish to the SUBSCRIBER one or more of the above described features, there shall be deducted from the amount which the SUBSCRIBER herein agrees to pay to the PUBLISHER, the amount hereinabove set opposite the above description of such feature or features not furnished, respectively, for each week that the said PUBLISHER shall fail to furnish said feature or features, respectively, and in such event the PUBLISHER shall endeavor, but shall not be

obliged, to furnish other matter to the SUBSCRIBER, in place of such feature or features as it is unable to furnish, at a price or prices hereinafter to be agreed upon by the parties hereto. If, however, an amount is not hereinabove set opposite each of the above described features, then it is understood and agreed that, in the event the PUBLISHER shall be unable to furnish to the SUBSCRIBER one or more of the above described features, there shall be deducted from the amount which the SUBSCRIBER herein agrees to pay to the PUBLISHER a reasonable sum representing the proportionate value of such feature or features not furnished, respectively, for each week that the said PUBLISHER shall fail to furnish said feature or features, respectively.

SECOND: The SUBSCRIBER shall pay the PUBLISHER for the aforesaid service throughout the term of this agreement at the weekly rate or sum of as per attached sheet dollars (\$ _____), all sums accruing in any one month to be due and payable on or before the 10th of the month following. In the event that the SUBSCRIBER shall fail to make any monthly payment as hereinabove provided, the PUBLISHER may suspend all deliveries of the above described features to the SUBSCRIBER until such time as said payment is made, and such suspension shall not constitute a breach of this contract on the part of the PUBLISHER.

THIRD: The SUBSCRIBER will not use, or cause or allow to be used, any feature or features furnished to it hereunder, except for one publication of each item thereof in its said newspaper, nor will it give or sell to any person, firm or corporation any of the matter furnished to it by the PUBLISHER hereunder, or any rights of any nature therein, without first obtaining in each instance the written consent of the PUBLISHER. The termination of this agreement shall end and terminate all the SUBSCRIBER'S rights to any use whatsoever of any and all matter delivered to it hereunder.

FOURTH: The SUBSCRIBER further agrees that it will cause to be printed in connection with all of the copyrighted or trade-marked matter published by it under this agreement, a copyright and trade-mark notice in the form required by the statute, giving the name of the person or corporation in whose name the copyright of such matter has been obtained.

FIFTH: The SUBSCRIBER covenants and agrees that it will not publish, or cause or allow to be published, any of the aforesaid matter in advance of the respective release dates therefor set by the PUBLISHER.

SIXTH: If the SUBSCRIBER fails to keep any of the agreements herein contained by said SUBSCRIBER to be kept, or if the SUBSCRIBER becomes insolvent, makes an assignment for the benefit of creditors, is adjudged a bankrupt, or a receiver of the property or business of the SUBSCRIBER is appointed, the PUBLISHER may suspend all deliveries of the above described features hereunder and may terminate this contract.

SEVENTH: No assignment of this contract, or of any rights hereunder, by operation of law or otherwise, shall be valid unless the PUBLISHER shall expressly consent in writing to such assignment.

EIGHTH: This agreement shall not be binding until it shall have been accepted at Chicago, Illinois, or New York City, New York, by the PUBLISHER by its President, Vice President, Secretary, Assistant Secretary, Treasurer, Assistant Treasurer, Manager or Assistant Manager, and such acceptance shall have been noted hereon.

NINTH: The printed and written provisions hereof constitute the whole agreement between the parties hereto and no oral modification thereof or additions thereto shall be binding upon said parties.

IN WITNESS WHEREOF the parties hereto have caused this instrument to be duly executed this 12 day of July 1949.

CHICAGO TRIBUNE NEW YORK NEWS SYNDICATE, INC.
(Publisher)

By /S/ M. Slott

Title: Manager

ACCEPTED [Chicago, Illinois
New York City, N. Y.]

July 12, 1949

CHICAGO TRIBUNE-NEW YORK
NEWS SYNDICATE, INC.

TIMES-HERALD, INC.
(Subscriber)

By /S/ M. Slott

By /S/ William C. Shelton

Title: Manager

Title: General Manager

THE TIMES-HERALD, INC.
WASHINGTON, D. C.

The following features are included in attached Washington, D. C. Times-Herald contract, for the term of three years, effective July 1, 1949:

Daily NEIGHBORS	\$20.00 per week
D&S GUMPS	50.00
D&S GASOLINE ALLEY	60.00
D&S DICK TRACY	75.00
D&S SMILIN' JACK	50.00
D&S HEALTH - VAN DELLEN	25.00
DANTON WALKER'S COLUMN	10.00
ED SULLIVAN'S COLUMN	7.50
DAILY ORR-PARRISH	15.00
D&S BRENDA STARR	40.00
JIMMY POWERS SPORTS COLUMN	5.00
Sunday TEENIE WEENIES	20.00
Daily GIGS & GAGS	15.00

\$392.50 per week

It is understood that should Publisher be unable to furnish any feature or features listed above, Subscriber may elect to take other available features in their stead or the amount charged for such feature or features may be cancelled.

It is understood that Times-Herald by direct arrangements, has exclusive rights in Washington to Batchelor cartoons and NY News editorial.

WIRE SERVICE

\$954.42 monthly

Pet. Ex. 85

THE TIMES-HERALD

WASHINGTON, D. C. The following features are included in the Times-Herald contract for the term of three years, effective

Memorandum of agreement entered into between CHICAGO TRIBUNE-NEW YORK NEWS SYNDICATE, INC. a Delaware corporation, hereinafter called the "PUBLISHER" and the undersigned corporation, firm or individual hereinafter called the "SUBSCRIBER," publisher of the Times Herald, hereinafter called the "newspaper."

WITNESSETH: For and in consideration of the sum of \$1.00 by each of the parties hereto to the other in hand paid, receipt whereof is acknowledged, each of the parties hereto covenants and agrees with the other as follows:

FIRST: The PUBLISHER will furnish to the SUBSCRIBER in proof or matrix form, and the SUBSCRIBER will accept and regularly publish in its said newspaper the following newspaper features, viz:

00.00	at \$	per week:
00.15	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:

for the term of one year beginning on the 1st day of July, 1952, and thereafter until either party has given to the other ninety (90) days' notice in writing of its election to terminate this contract; said notice may be given ninety days prior to the end of the above described term, or at any time thereafter, but shall not effect a termination of the contract until the expiration of ninety days after the giving of said notice. In the event that, for any reason, the PUBLISHER shall be unable to furnish to the SUBSCRIBER one or more of the above described features, there shall be deducted from the amount which the SUBSCRIBER herein agrees to pay to the PUBLISHER, the amount hereinabove set opposite the above description of such feature or features not furnished, respectively, for each week that the said PUBLISHER shall fail to furnish said feature or features, respectively, and in such event the PUBLISHER shall

endeavor, but shall not be obliged, to furnish other matter to the SUBSCRIBER, in place of such feature or features as it is unable to furnish, at a price or prices hereinafter to be agreed upon by the parties hereto. If, however, an amount is not hereinabove set opposite each of the above described features, then it is understood and agreed that, in the event the PUBLISHER shall be unable to furnish to the SUBSCRIBER one or more of the above described features, there shall be deducted from the amount which the SUBSCRIBER herein agrees to pay to the PUBLISHER a reasonable sum representing the proportionate value of such feature or features not furnished, respectively, for each week that the said PUBLISHER shall fail to furnish said feature or features, respectively.

SECOND: The SUBSCRIBER shall pay the PUBLISHER for the aforesaid service throughout the term of this agreement at the weekly rate or sum of as shown on attached sheet dollars (\$), all sums accruing in any one month to be due and payable on or before the 10th of the month following. In the event that the SUBSCRIBER shall fail to make any monthly payment as hereinabove provided, the PUBLISHER may suspend all deliveries of the above described features to the SUBSCRIBER until such time as said payment is made, and such suspension shall not constitute a breach of this contract on the part of the PUBLISHER.

THIRD: The SUBSCRIBER will not use, or cause or allow to be used, any feature or features furnished to it hereunder, except for one publication of each item thereof in its said newspaper, nor will it give or sell to any person, firm or corporation any of the matter furnished to it by the PUBLISHER hereunder, or any rights of any nature therein, without first obtaining in each instance the written consent of the PUBLISHER. The termination of this agreement shall end and terminate all the SUBSCRIBER'S rights to any use whatsoever of any and all matter delivered to it hereunder.

FOURTH: The SUBSCRIBER further agrees that it will cause to be printed in connection with all of the copyrighted or trademarked matter published by it under this agreement, a copyright and trade-mark notice in the form required by the statute, giving the name of the person or corporation in whose name the copyright of such matter has been obtained.

FIFTH: The SUBSCRIBER covenants and agrees that it will not publish, or cause or allow to be published, any of the aforesaid matter in advance of the respective release dates therefor set by the PUBLISHER.

SIXTH: If the SUBSCRIBER fails to keep any of the agreements herein contained by said SUBSCRIBER to be kept, or if the SUBSCRIBER becomes insolvent, makes an assignment for the benefit of creditors, is adjudged a bankrupt, or a receiver of the property or business of the SUBSCRIBER is appointed, the PUBLISHER may suspend all deliveries of the above described features hereunder and may terminate this contract.

SEVENTH: No assignment of this contract, or of any rights hereunder, by operation of law or otherwise, shall be valid unless the PUBLISHER shall expressly consent in writing to such assignment.

EIGHTH: This agreement shall not be binding until it shall have been accepted at Chicago, Illinois, or New York City, New York, by the PUBLISHER by its President, Vice President, Secretary, Assistant Secretary, Treasurer, Assistant Treasurer, Manager or Assistant Manager, and such acceptance shall have been noted hereon.

NINTH: The printed and written provisions hereof constitute the whole agreement between the parties hereto and no oral modification thereof or additions thereto shall be binding upon said parties.

IN WITNESS WHEREOF the parties hereto have caused this instrument to be duly executed this 3rd day of July 1952.

CHICAGO TRIBUNE-NEW YORK NEWS SYNDICATE, INC.
(Publisher)

By /S/ M. Slott

Title: Manager

ACCEPTED [Chicago, Illinois
New York City, N. Y.]

July 3, 1952

CHICAGO TRIBUNE-NEW YORK NEWS SYNDICATE, INC. WASHINGTON TIMES-HERALD
(Subscriber)

By /S/ M. Slott By /S/ William C. Shelton

Title: Manager Title: Gen. Mgr.

**THE TIMES-HERALD
WASHINGTON, D. C.**

Attached contract covers the following:

D&S GASOLINE ALLEY	\$60.00	weekly
D&S DICK TRACY	75.00	"
D&S SMILIN' JACK	50.00	"
D&S BRENDA STARR	40.00	"
D&S MOON MULLINS	75.00	"
D&S ORPHAN ANNIE	75.00	"
Daily NEIGHBORS	20.00	"
Daily ORR-PARRISH CARTOONS	15.00	"
Daily ALL IN SPORT	15.00	"
Daily LAUGHING MATTER	10.00	"
D&S HEALTH COLUMN	25.00	"
D&S GOREN BRIDGE	18.00	"
D&S TEST YOUR HORSE SENSE	12.50	"
DANTON WALKER COLUMN	10.00	"
D. C. WASH COLUMN	6.00	"
MEN'S WEAR COLUMN by Jim Bascom	7.50	"
CHAPMAN NEW YORK THEATRE LETTER (includes regular daily columns sent directly by Chapman)	15.00	"
MARCIA WINN'S "YOU & YOUR CHILD" with photos	10.00	"
WHAT'S YOUR QUESTION?	5.00	"
NOW AND THEN	5.00	"
	\$549.00	weekly
WIRE SERVICE	\$1,387.75	monthly
REUTERS SERVICE	275.00	monthly

Pet. Ex. 86

**THE TIMES-HERALD
WASHINGTON, D. C.**

Memorandum of agreement entered into between CHICAGO TRIBUNE-NEW YORK NEWS SYNDICATE, INC., a Delaware corporation, hereinafter called the "PUBLISHER" and the undersigned corporation, firm or individual, hereinafter called the "SUBSCRIBER," publisher of the Times-Herald, hereinafter called the "newspaper."

WITNESSETH: For and in consideration of the sum of \$1.00 by each of the parties hereto to the other in hand paid, receipt whereof is acknowledged, each of the parties hereto covenants and agrees with the other as follows:

FIRST: The PUBLISHER will furnish f. o. b. each week to the SUBSCRIBER in proof or matrix form, and the SUBSCRIBER will accept and regularly publish in its said newspaper the following newspaper features, viz.:

	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
AS SHOWN ON ATTACHED SHEET	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:
	at \$	per week:

for the term of one year beginning on the 1st day of July, 1953, and thereafter until either party has given to the other ninety (90) days' notice in writing of its election to terminate this contract; said notice may be given ninety days prior to the end of the above described term, or at any time thereafter, but shall not effect a termination of the contract until the expiration of ninety days after the giving of said notice. In the event that, for any reason, the PUBLISHER shall be unable to furnish to the SUBSCRIBER one or more of the above described features, there shall be deducted from the amount which the SUBSCRIBER herein agrees to pay to the PUBLISHER, the amount hereinabove set opposite the above description of such feature or features not furnished, respectively, for each week that the said PUBLISHER shall fail to furnish said feature or features, respectively,

and in such event the PUBLISHER shall endeavor, but shall not be obliged, to furnish other matter to the SUBSCRIBER, in place of such feature or features as it is unable to furnish, at a price or prices hereinafter to be agreed upon by the parties hereto. If, however, an amount is not hereinabove set opposite each of the above described features, then it is understood and agreed that, in the event the PUBLISHER shall be unable to furnish to the SUBSCRIBER one or more of the above described features, there shall be deducted from the amount which the SUBSCRIBER herein agrees to pay to the PUBLISHER a reasonable sum representing the proportionate value of such feature or features not furnished, respectively, for each week that the said PUBLISHER shall fail to furnish said feature or features, respectively.

SECOND: The SUBSCRIBER shall pay the PUBLISHER for the aforesaid service throughout the term of this agreement at the weekly rate or sum of as shown on attached sheet dollars (\$ _____), all sums accruing in any one month to be due and payable on or before the 10th of the month following. In the event that the SUBSCRIBER shall fail to make any monthly payment as hereinabove provided, the PUBLISHER may suspend all deliveries of the above described features to the SUBSCRIBER until such time as said payment is made, and such suspension shall not constitute a breach of this contract on the part of the PUBLISHER.

THIRD: The SUBSCRIBER will not use, or cause or allow to be used, any feature or features furnished to it hereunder, except for one publication of each item thereof in its said newspaper, nor will it give or sell to any person, firm or corporation any of the matter furnished to it by the PUBLISHER hereunder, or any rights of any nature therein, without first obtaining in each instance the written consent of the PUBLISHER. The termination of this agreement shall end and terminate all the SUBSCRIBER'S rights to any use whatsoever of any and all matter delivered to it hereunder.

FOURTH: The SUBSCRIBER further agrees that it will cause to be printed in connection with all of the copyrighted or trademarked matter published by it under this agreement, a copyright and trademark notice in the form required by the statute, giving the name of the person or corporation in whose name the copyright of such matter has been obtained.

FIFTH: The SUBSCRIBER covenants and agrees that it will not publish, or cause or allow to be published, any of the aforesaid matter in advance of the respective release dates therefor set by the PUBLISHER.

SIXTH: If the SUBSCRIBER fails to keep any of the agreements herein contained by said SUBSCRIBER to be kept, or if the SUBSCRIBER becomes insolvent, makes an assignment for the benefit of creditors, is adjudged a bankrupt, or a receiver of the property or business of the SUBSCRIBER is appointed, the PUBLISHER may suspend all deliveries of the above described features hereunder and may terminate this contract.

SEVENTH: No assignment of this contract, or of any rights hereunder, by operation of law or otherwise, shall be valid unless the PUBLISHER shall expressly consent in writing to such assignment.

EIGHTH: This agreement shall not be binding until it shall have been accepted at Chicago, Illinois, or New York City, New York, by the PUBLISHER by its President, Vice President, Secretary, Assistant Secretary, Treasurer, Assistant Treasurer, Manager or Assistant Manager, and such acceptance shall have been noted hereon.

NINTH: The printed and written provisions hereof constitute the whole agreement between the parties hereto and no oral modification thereof or additions thereto shall be binding upon said parties.

IN WITNESS WHEREOF the parties hereto have caused this instrument to be duly executed this 15 day of June 1953.

CHICAGO TRIBUNE-NEW YORK NEWS SYNDICATE, INC.
(Publisher)

By /S/ _____

Title: _____

ACCEPTED [Chicago, Illinois
New York City, N. Y.]

June 15, 1953

CHICAGO TRIBUNE-NEW YORK
NEWS SYNDICATE, INC.

(Subscriber)

By /S/ M. Slott

By _____

Title: Manager

Title: _____

DISTRICT OF COLUMBIA TAX COURT

THE WASHINGTON POST COMPANY,	)	
	)	
Petitioner	)	
	)	
vs.	)	Docket No. 1494
	)	
DISTRICT OF COLUMBIA,	)	
	)	
Respondent	)	
WASHINGTON TIMES-HERALD, INC.,	)	
	)	
Petitioner	)	
	)	
vs.	)	Docket No. 1495
	)	
DISTRICT OF COLUMBIA,	)	
	)	
Respondent	)	
THE WASHINGTON POST COMPANY,	)	
	)	
Petitioner	)	
	)	
vs.	)	Docket No. 1497
	)	
DISTRICT OF COLUMBIA,	)	
	)	
Respondent	)	

Room 1402,
305 Broadway,
New York, N. Y.,
July 6, 1955 - 10 a. m.

Deposition of JAMES HENNESSY taken on behalf of the
petitioners at the office of Gerald Braddick, Court Reporter-

Notary Public, Room 1402, 305 Broadway, New York City, N. Y.,
at 10 a. m., on July 6, 1955, pursuant to notice dated June 27,
1955.

A P P E A R A N C E :

FONTAINE C. BRADLEY, ESQ.,
Attorney for the Petitioners.

- - - - -

J A M E S H E N N E S S Y , called as a witness on
behalf of the petitioners, being first duly sworn,
testified as follows:

BY MR. BRADLEY:

Q Where do you reside, Mr. Hennessy? A Rye, New
York.

Q Where is your place of business located? A 220
East 42nd Street, New York City.

Q Where do you plan to be on July 11, Monday, this
coming Monday? A I plan to be at work.

Q At your office in New York? A At my office in New
York.

Q Are you employed by United Features Syndicate?
A That's right.

Q How long have you been so employed? A Twenty years.

Q What is your position with them? A Business manager.

Q How long have you been the business manager -- approximately? A Oh, I have been the business manager five or six years.

Q What were you prior to that? A Assistant business manager -- prior to that production manager.

Q Are you familiar with the processes involved in making a matrice with the impression on it of an artist's drawing?

A Yes, sir.

Q Can you briefly describe for me what is the process involved in making such a matrice? A Starting with the drawing?

Q Taking the drawing and reproducing the drawing in the form of an impression on a matrice. A The drawings are engraved, and from those engravings the matrice is made by laying a sheet of matrice paper over the engravings and applying pressure with a molding press.

Q By a sheet of matrice paper do you mean a raw mat?

A Yes.

Q What substance is that? A You mean what it is made of?

Q Fiber? A Fiber.

Q Wood fiber? A Wood fiber.

Q Does your syndicate do any engraving work itself?

A No.

Q Does it do any stereotyping or molding work? A No.

Q How does it arrange to have the matrice made from an artist's drawing? A Well, we have first of all an arrangement with an engraving company which makes all our engravings and an arrangement with another company which does the stereotyping.

Q The company that does the stereotyping, they do the job of taking the photo-engraving and making the impression on the mat, and there is, isn't there, a separate charge for molding from the raw mat, or do they include it all in one bill, the cost of the raw mat? A Oh, yes. They buy all the materials including the raw mat. We have nothing to do with that.

Q You send the photo-engraving to their plant?

A Yes.

Q And they take the photo-engraving and do the molding?

A They set it up in a form and mold it.

Q Directing your attention to the period between August 1, 1949, and March 31, 1954, can you tell us whether the United

Features Syndicate furnished any daily features in matrice form to the Washington Post in Washington, D. C. ? A Yes. We did.

Q Some time during that period? A Yes.

Q Directing your attention to another set of dates which really bracket two periods, the first period would be March 1, 1951, through January, 1952, and the second period would be April 1, 1953, through March 19, 1954, did your syndicate during either of those periods furnish daily features in matrice form to the Washington Times-Herald, Washington, D. C. ? A Yes.

Q Have you caused a study to be made of your records to determine what daily features were furnished in matrice form to these two newspapers, the Washington Times-Herald, Washington, D. C., and the Washington Post, Washington, D. C., during the periods mentioned? A Yes. I have.

Q Have you also caused a study of your records to be made to determine the cost charged these papers for such feature service? A Yes, sir.

Q What can you tell us about the cost to your syndicate of producing on a matrice the artist's drawings of the daily features furnished those two newspapers during that period? Has anything been done recently to make a check of your records to determine

anything about that? A Yes.

Q What was done in that respect? A Our Accounting Department prepared these figures that I have before me here.

Q That is a summary of what? A Of engraving and stereotyping charges on three features which we have served to the Washington Post and the Times-Herald during the periods mentioned.

Q Was that schedule prepared in your office? A In our Accounting Office. Yes.

Q Was it prepared under your supervision or control or both? A Yes.

Q The schedule which you have in your hand has in the upper left-hand corner, the first column is captioned, "Feature," and then below that are names of three features, Ferd-Nand, Li'l Abner and Peanuts; can you tell us which of those were furnished to the Washington Post and which were furnished to the Times-Herald? A Ferd-Nand and Peanuts were furnished to the Washington Post.

Q And these are costs within the period mentioned, when they started and ended? A That's right.

Q And which was furnished to the Times-Herald?

A Li'l Abner.

Q At the extreme right-hand side of the schedule you have in your column captioned, "Price of Feature," certain figures. Are the figures in that column the price charged for the daily feature service or daily and Sunday? A Just daily.

Q How did you arrive at the price for the daily feature where you furnished daily and Sunday service at a given price?

A We have taken one-half of the contract rate -- in other words, allocated one-half on our books to each.

Q Do you in your business have any occasion to make any such allocations? A Yes. Usually we make the allocations ourselves unless the newspaper places a greater value on one size or the other.

Q Why do you have to make the allocations in your business -- for some accounting reason? A For accounting reasons.

Q And is it your practice to use fifty percent or some other percentage? A It is usually fifty percent.

Q The figures in that column captioned, "Price of Feature," are the price for how many releases of the daily feature?

A For the daily strip. It would be six daily releases.

Q The cost figures appearing in the column captioned,

"Engraving," and the column captioned, "Mats," are those the cost figures for six daily releases? A That's right.

Q Taking up the column captioned, "Engraving," can you tell us roughly the method used in arriving at that figure of \$13.62? A Well, we pay a price per square inch for engravings, and each engraving is measured and we get the total of square inches for all six releases.

Q And was this figure taken from invoices of outside concerns that were rendered to your firm or was it taken from your ledger book? A This figure was taken from our ledger book, but the ledger book shows the figures as invoiced to us.

Q And those ledgers are rather bulky I suppose?

A Yes.

Q The invoices which were rendered to your syndicate for engravings, are they available now in your office in New York?

A Not in our office -- not in our office in New York, No.

Q Where would they be? A They are in a warehouse in New York in another locality.

Q They are stored? A They are stored.

Q However, the same figure appears on your ledger, does it not? A Yes.

Q Where is the ledger located? A In our main office.

Q It is available in your main office in case the opposing side wished to examine it? A Right.

Q Is the same true with respect to the figures appearing in the "Mats" column? A It is.

Q The column captioned, "Mats," represents what?

A Represents the cost to us as invoiced for the six mats of the six daily releases during the particular periods listed.

Q Mats -- that means the cost of molding a mat from the photo-engraving; is that what it means? A That's right.

Q All the figures in the column, "Engraving," were they taken from your ledger or were they taken from the invoices?

A They are all taken from our ledger.

Q The invoices are not available? A No.

Q The same is true of the figures in the, "Mats," column?

A Yes.

Q How about the figures in the column, "Number of Subscribers"?

A That record is in our office.

Q It is in your office too? A Yes.

Q It is a rather bulky record I assume? A Yes. It is.

Q Is it available for inspection? A Yes.

Q Were these figures accurately transcribed from it?

A They were.

Q Are the subscribers to your service with respect to any of these features entitled to the option of taking either a four or a five-column width strip? A They are if we make both sizes.

Q Did you during this period make both sizes? A On Li'l Abner we did; we made both sizes, and I have noted here that on Peanuts they were made, or we made two sizes, three and four-column sizes.

Q But later changed -- A But later changed to just a four-column.

Q Where you made two sizes did you include the cost of the photo-engraving for each size or just one? A For each size.

Q You added them together? A Yes.

Q Is that the reason, for instance, that as to Peanuts there is a drop in the photo-engraving cost? A Yes.

Q Can you tell us anything about whether these figures of cost could be said to be fairly representative of the range of cost during the periods involved? What I have in mind is we have picked dates at the beginning of the periods and at the end, and

there may be one or two dates in the middle. A That's right. You mean other dates?

Q Other dates. A They would vary very little if at all.

Q And your costs generally were going up or down during that period? A They were going up slightly.

MR. BRADLEY: I offer in evidence as Petitioners' Exhibit 21 the schedule which this witness has identified and which starts in the upper left-hand corner with the designation, "Ferd-Nand Strip," and immediately beneath the caption, "Feature."

(Marked Petitioners' Exhibit 21.)

- - - - -

/S/ JAMES HENNESSY

Subscribed and sworn to before me
this 8th day of July , 1955.

/S/ GERALD BRADDICK
 GERALD BRADDICK
Notary Public, State of New York
 No. 41-5413300
Qualified in Queens County
Commission Expires March 30, 1956

DISTRICT OF COLUMBIA TAX COURT

THE WASHINGTON POST COMPANY,)
)
 Petitioner)
)
 v.) Docket No. 1494
)
 DISTRICT OF COLUMBIA,)
)
 Respondent)

WASHINGTON TIMES-HERALD, INC.,)
)
 Petitioner)
)
 v.) Docket No. 1495
)
 DISTRICT OF COLUMBIA,)
)
 Respondent)

THE WASHINGTON POST COMPANY,)
)
 Petitioner)
)
 v.) Docket No. 1497
)
 DISTRICT OF COLUMBIA,)
)
 Respondent)

Room 1402
 305 Broadway
 New York, New York
 July 6, 1955
 10:00 o'clock a. m.

DEPOSITION OF JOSEPH D. MC GRAW taken on behalf of the
 Petitioners at the office of Gerald Braddick, Court Reporter-Notary

Public, Room 1402, 305 Broadway, New York, New York at 10:00 o'clock a.m. on July 6, 1955, pursuant to notice dated June 27, 1955.

A P P E A R A N C E S: FONTAINE C. BRADLEY, ESQ.
Attorney for the Petitioners

J O S E P H D. M c G R A W, called as a witness on
behalf of the Petitioners, being first duly sworn, testified
as follows:

BY MR. BRADLEY:

Q Please state for the record your name, sir. A Joseph D. McGraw.

Q Where do you live, Mr. Mc Graw? A East Orange, New Jersey.

Q Where is your place of business? **A** 342 Madison Avenue,
Post Hall Syndicate.

Q Where do you plan to be on July 11th, Monday? A I'll be out of town on my vacation.

Q Do you plan to be anywhere near Washington D. C. ?

A No. I don't. I will be almost 200 miles from Washington.

Q Are you familiar generally with the process of making matrices with an imprint on them of the artist's drawing with respect to comic strips? A Yes. I am.

Q What is your position at Post Hall Syndicate?

A My title is office manager.

Q How long have you been employed by Post Hall Syndicate?

A Over nine years -- since 1946.

Q What positions have you held with them? A I have always been office manager. That's been my title.

Q Have you checked over the records of Post Hall Syndicate to determine what, if any, daily features were furnished by it to Washington Times Herald during the period from August 1, 1949 through March 31, 1954? A Yes, I did.

Q Did they furnish any to that newspaper? A No matted features.

Q How about Washington Post in Washington, D. C. during that period? Were any features furnished it in mat form by Post Hall Syndicate? A Yes.

Q What features were they? A Mark Trail, daily comic strip, Dennis the Menace, daily comic panel and Day Shift, daily comic panel.

Q Were any of those furnished on Sunday as well as daily?
A Yes.

Q Which were they? A Mark Trail and Dennis the Menace.

Q Have you determined the price charged the Washington Post for the service on the daily features for each of those features you have mentioned? A Yes.

Q In doing that have you eliminated any charge for Sunday features? A Well, we have always charged the Washington Post a separate amount.

Q You have? A Each one is a complete different transaction, not connected at all.

Q So that it is not necessary to do any allocating?
A That is correct.

Q What was the price per week charged Washington Post for Mark Trail? A \$25 a week.

Q How about Dennis the Menace? A \$15 from June 18, 1951 until June 1, 1953 at which time the price was increased to \$20.

Q How about Day Shift? A \$20.

Q And in each of those instances the price figure you have given is the price for six daily releases? A That's correct.

Q Have you checked over your records to determine what the cost was to Post Hall Syndicate of making photo engravings and of molding or stereotyping work in order to produce from the artist's

drawing a mat with the impression on it of the artist's drawing?

A Yes. I have.

Q Can you tell us whether Post Hall Syndicate did its own photo engraving or did some one outside do it? A We had some one outside do it.

Q How about the mat work, that is, molding the impression from the photo engraving onto the mat? A We have an outside firm doing that also.

Q Did the same firm do the photo engraving and mat work or separate firms? A Separate firms.

Q And those firms billed Post Hall Syndicate for the work done? A Yes.

Q Have you located the invoices showing the amounts billed Post Hall Syndicate for that work? A Yes. I have.

Q Do you have those with you? A Yes.

Q Can you tell us what they are and describe the figures on them, equating those figures to the cost per subscriber in each instance and then let me have them and I will put them in evidence?

A I have an invoice dated June 21, 1949 from the Koppel Photo Engraving Company, Inc., covering Mark Trail engravings for five weeks beginning July 11, 1949 through the week beginning

August 8, 1949. The invoice covers for each week a set of 4 column engravings at \$16 a set, and for each week a set of 5 column engravings at \$20 for each set.

Q Regardless of the size of the column width selected by a subscriber, you have included in the engraving cost the cost of making two engravings, one a 4 column width and one a 5 column width; is that correct? A Yes. I have taken the cost of both the 4 and 5 column engravings. The total is \$36. I have divided that by the number of clients according to our records on August 1, 1949, and reached a figure of 30¢ per client.

Q For the photo engravings? A For the photo engravings.

Q For Mark Trail? A For Mark Trail.

MR. BRADLEY: I offer in evidence as Petitioners' exhibit 34 the invoice dated June 21, 1949 from Koppel Photo Engraving Company, Inc. to Post Hall Syndicate. (Marked Petitioners' exhibit 34.)

Q With respect to Mark Trail, do you have an invoice showing the 1949 cost of mat molding work? A Yes. I have.

Q What does it show it to be per mat? A This invoice covers two weeks releases of mats, and the price for each week is 18¢. The invoice shows two weeks at 36¢.

Q So it is 18¢ for the mat cost? A Yes.

Q So that the mat cost, plus the photo engraving cost on August 1, 1949 for Mark Trail comes to 48¢? A Yes.

Q As compared to the weekly price for the feature of \$25?

A That is correct.

MR. BRADLEY: I offer in evidence as Petitioners' exhibit 35 an invoice dated June 1, 1949 from Galvanic Printing Plate & Matrix Company, Inc. to Post Hall Syndicate.

(Marked Petitioners' exhibit 35.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA,

:

Petitioner,

:

v.

:

No. 13,007

THE WASHINGTON POST COMPANY,

:

Respondent.

:

DISTRICT OF COLUMBIA,

:

Petitioner,

:

v.

:

No. 13,008

WASHINGTON TIMES-HERALD, INC.,

:

Respondent.

:

DISTRICT OF COLUMBIA,

:

Petitioner,

:

v.

:

No. 13,009

THE WASHINGTON POST COMPANY,

:

Respondent.

:

MOTION TO VACATE ORDER DENYING PETITIONER'S
MOTION FOR HEARING EN BANC AND FOR
HEARING EN BANC

Petitioner, District of Columbia, moves the Court pursuant to Rule 31 of the General Rules of this Court to vacate its order filed April 19, 1956 denying petitioner's motion for hearing en banc and to enter an order setting the above-captioned cases down for hearing

en banc.

The grounds for this motion are as follows:

(1) On April 2, 1956 counsel for petitioner filed a motion for hearing en banc and gave as the basis for such motion the grounds set forth in Exhibit A hereto attached and made a part hereof. This motion was denied by order of this Court filed April 19, 1956.

(2) The above-entitled cases came on for hearing on May 21, 1956 before a Division of this Court, consisting of Chief Judge Edgerton and Circuit Judges Bastian and Burger. At such hearing, and prior to the presentation of any argument before the Division of this Court by counsel for petitioner, the Chief Judge advised counsel for petitioner that the Division would not permit counsel for petitioner to present to the Division argument concerning the liability of respondents for District of Columbia sales and use taxes as raised by petitioner on the appeals of the above-entitled cases to the United States Court of Appeals for the District of Columbia Circuit, for the reason that the Division of this Court was without authority to overrule the decision of this Court sitting en banc in the case of Washington Times-Herald, Inc. v. District of Columbia, 94 U.S. App. D.C. 154, 213 F. 2d 23. The Chief Judge made inquiry of counsel for petitioner whether petitioner had, prior to May 21, 1956, moved this Court to hear the above-

entitled cases en banc, and was advised by counsel for petitioner that a motion for such a hearing had been filed by petitioner and denied by this Court. Thereafter, Chief Judge Edgerton reiterated that the Division of this Court, consisting of the Chief Judge and Circuit Judges Bastian and Burger, would not permit counsel for petitioner to present to the Division any argument relating to the matter considered by this Court in Washington Times-Herald, Inc. v. District of Columbia, 94 U.S. App. D.C. 154, 213 F. 2d 23 for the reason, as stated by Chief Judge Edgerton, that this Division was without power to overrule Washington Times-Herald, Inc. v. District of Columbia, supra. Chief Judge Edgerton advised counsel for petitioner that counsel, if he so desired, could present argument to the Court upon any points involved in the appeals of the above-entitled cases other than the question of the liability of respondents for District of Columbia sales and use taxes under the District of Columbia Sales and Use Tax Act. Counsel for petitioner thereupon advised the Court that counsel was of the opinion that the petitioner was entitled to present to the Court and to have considered by the Court all matters involved in the appeals of the above-entitled cases to the Court, for the reason that all such matters were important to the disposition of such appeals, and advised the Court further that counsel for petitioner was not disposed

to proceed on the basis of a partial hearing of the points presented on appeal. Counsel for petitioner requested the Court, therefore, to continue the hearing so that the Court might reconsider the motion filed by the petitioner for hearing en banc or, in the alternative, counsel for petitioner be permitted to file with the Court a second motion for a hearing of the above-entitled cases en banc. The motion for continuance was denied. Counsel for petitioner was again advised by Chief Judge Edgerton that counsel for petitioner would be permitted by the Division of the Court, at the election of counsel for petitioner, to present to the Court argument on all points other than that raised on appeal pertaining to the liability of respondents for District of Columbia sales and use taxes or, if counsel for petitioner desired, counsel could submit the cases without argument. Counsel for petitioner advised the Court that, under the circumstances, counsel would not proceed on the basis of the restrictive argument, but would submit the cases without argument.

(3) These are appeals from decisions of the District of Columbia Tax Court, authorized by Section 47-2404, D. C. Code, 1951, Supp. III, which provides that this Court shall have the power to affirm, modify or reverse the decision of the District of Columbia Tax Court, with or without remanding the case for hearing, as justice may require.

(4) The new Judicial Code, 28 USC, Section 46(c), provides that cases and controversies before United States Circuit Courts of Appeal shall be "heard and determined" by a Court or division of not more than three judges, unless a hearing or rehearing before the Court in banc is ordered by a majority of the Circuit Judges of the Circuit who are in active service. Counsel for petitioner have not found any case decided by the Supreme Court on the particular situation here involved. However, in Western Pacific Railroad Corporation v. Western Pacific Railroad Company, 345 U. S. 247, 73 S. Ct. 656, 97 L. Ed. 986, the Supreme Court stated that:

"* * *The three judges who decide an appeal may be satisfied as to the correctness of their decision. Yet, upon reflection, after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attention of the full court."

(Emphasis supplied.)

In the present cases the Division of this Court, consisting of Chief Judge Edgerton and Circuit Judges Bastian and Burger, considered that it was powerless to hear and determine the basic, primary issue on appeal, namely, whether or not the respondents were liable for District of Columbia sales and use taxes. While the Division of the Court offered to hear argument on the other issues raised by petitioner, it is obvious that the Division of the Court,

having predetermined its ruling on the principal issue, would necessarily have decided the subsidiary, dependent issues on the basis of its decision on the principal issue. Such denial of a hearing to which the petitioner is entitled constitutes denial of due process of law under the Fifth Amendment to the Constitution of the United States and requires, under the circumstances, a hearing in these cases by this Court sitting en banc.

(5) Petitioner submits that it is entitled to a full hearing on the points raised in its appeals in these cases; that, under the circumstances described above, the three-judge Court assigned to hear petitioner on its appeals believes itself to be without authority or power to fully hear the petitioner on such appeals; that unless this Court hears petitioner on these appeals, sitting en banc, petitioner will have been denied due process of law, as aforesaid; and that this Court should consider this motion sitting en banc and, under the circumstances, grant said motion.

VERNON E. WEST,
Corporation Counsel, D. C. ,

CHESTER H. GRAY,
Principal Assistant Corporation
Counsel, D. C. ,

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C. ,

HENRY E. WIXON,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Motion to Vacate Order Denying Petitioner's Motion for Hearing En Banc and for Hearing En Banc was mailed, postage prepaid, to Fontaine C. Bradley, Esq., attorney for respondents, 701 Union Trust Building, Washington, D. C., this 24th day of May, 1956.

HENRY E. WIXON,
Assistant Corporation Counsel, D. C.,
Attorney for Petitioner,
District Building,
Washington 4, D. C.

EXHIBIT A

On May 13, 1954, this Court issued its decision in the case of Washington Times-Herald, Inc., petitioner v. District of Columbia, respondent, 94 U.S. App. D.C. 154, 213 F. 2d 23. That case was argued before this Court en banc on a rehearing ordered by this Court sua sponte on September 29, 1953 following an original argument of the case on January 14, 1953 before Circuit Judges Clark, Miller and Washington. This Court, in its decision of May 13, 1954, reversed the District of Columbia Tax Court which had held that Washington Times-Herald, Inc. was liable for certain District of Columbia use taxes. A minority of the Court, consisting of the Chief Judge and Circuit Judges Fahy and Washington, although they concurred in the result reached by the majority, disagreed with the majority on the question of the basis for reversal of the decision of the District of Columbia Tax Court. There is presented in the present appeals to this Court a question concerning a conflict in the decision of this Court in Washington Times-Herald, Inc. v. District of Columbia, supra, with the decision of this Court in Myer v. Washington Times Co., 64 App. D.C. 213, 76 F. 2d 988, cert. den. 295 U.S. 734 which, in the opinion of counsel for petitioner, can properly be resolved only by a consideration of this matter by this Court sitting en banc. The above-captioned appeals present to this Court questions relating to procedures

adopted by the District of Columbia Tax Court in its determination of the above-captioned cases which have not been decided by this Court in any other case, and which are of major importance as they relate to proceedings before the District of Columbia Tax Court under its governing statute.

The question of the application of the decision of this Court in Myer v. Washington Times Co., supra, to the transactions of respondent in the above-captioned cases was not presented to this Court at the hearing by this Court of the appeal in Washington Times-Herald, Inc. v. District of Columbia, supra; nor is reference to the Myer case made in the decision of this Court in Washington Times-Herald, Inc. v. District of Columbia, supra.

The questions presented on these appeals as to the authority of the District of Columbia Tax Court to proceed in the hearing of cases before it on depositions not authorized by the language of the Act creating the District of Columbia Tax Court is, itself, of such importance as to justify a consideration of this matter by the entire court. The other questions presented on this appeal similarly justify and warrant a hearing of these appeals by this Court en banc.

BRIEF FOR RESPONDENTS

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,007

DISTRICT OF COLUMBIA, *Petitioner,*

v.

THE WASHINGTON POST COMPANY, *Respondent.*

No. 13,008

DISTRICT OF COLUMBIA, *Petitioner,*

v.

WASHINGTON TIMES-HERALD, INC., *Respondent.*

No. 13,009

DISTRICT OF COLUMBIA, *Petitioner,*

v.

THE WASHINGTON POST COMPANY, *Respondent.*

**On Petitions for Review of Decisions of the District of
Columbia Tax Court**

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QUESTIONS PRESENTED

The questions presented are:

1. Whether this Court should overrule its decision in *Washington Times-Herald, Inc. v. District of Columbia*, 94 U.S. App. D.C. 154, 213 F. 2d 23, in which it was held that a newspaper is not liable for a District of Columbia use tax on comic strips and features furnished it by syndicates.

2. Whether the District of Columbia Tax Court committed any procedural or other errors in these cases warranting a reversal of its decision.

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**On Petitions for Review of Decisions of the District of
Columbia Tax Court**

BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

The jurisdictional statement made in the petitioner's
brief is not questioned.

COUNTERSTATEMENT OF THE CASES

These cases involve the application of the District of Columbia Sales and Use Tax Act (Act of May 27, 1949, c. 146, 63 Stat. 112, *et. seq.*; Title 47, c. 26 and c. 27, D.C. Code, 1951) with respect to comic strips and features furnished by syndicates to the respondents. (J.A. 69, 72, 74) At the outset, it should be pointed out that in this counterstatement the respondents have relied only on findings of fact made in the Findings of Fact and Opinion of the court below, namely the District of Columbia Tax Court, hereinafter referred to as the Tax Court. Furthermore, the petitioner does not in its brief challenge the accuracy of any of the findings of fact made by the Tax Court.

In the case of The Washington Post Company the use taxes were paid on amounts paid by it to syndicates for daily comic strips furnished it in matrix form for publication. (J.A. 69) In the case of Washington Times-Herald, Inc., the use taxes were paid on amounts paid by it to syndicates for features and comic strips furnished it in matrix form for publication, but a small amount of such taxes were paid with respect to matrices which were never received in the District of Columbia and with respect to features furnished in non-mat form. (J.A. 72, 74)

Artists furnished drawings to the syndicates from which were made the matrices. Under the contracts between the syndicates and the respondents, the respondents were given the right to reproduce and publish in their newspapers the work of the artists who made the drawings. The syndicates carried out these contracts by forwarding to the respondents the matrices bearing the impressions of the current sequence of the strips and the respondents used the matrices to produce a metal plate. From this metal plate the newspaper page containing the comic strips and features was printed. (J.A. 75)

A typical arrangement between a syndicate and an artist was for the artist to receive fifty percent of the gross

proceeds received from the distribution of the feature. The syndicate obtained a market for the distribution of the artist's drawings. The matrices from which the drawings could be reproduced by a subscribing newspaper were distributed by the syndicates to large numbers of such newspapers. (J.A. 75, 76)

The respondents appealed to the Tax Court from the assessment of use taxes against them, and the Tax Court decided the cases in favor of the respondents. The Tax Court in its Findings of Fact set forth the weekly charges made by syndicates to the respondents, the value or sales price of the mats furnished and the ratio or percentage of such value or sales price to the weekly charges during the taxable periods involved. (J.A. 76, 77, 78) The Tax Court found that the physical or material value of the mats furnished the respondents by the syndicates was in no instance in excess of four percent of the amount charged for the services rendered the respondents under the contracts between the respondents and the particular syndicate, and the percentages ran from less than one to four percent which obtained in one instance only. (J.A. 79, 80)

In its opinion the Tax Court stated that the case of *Washington Times-Herald, Inc. v. District of Columbia*, *supra*, was decided "under facts identical with those here present." It also quoted this Court's conclusion in that case that such transactions "are clearly exempt under § 47-2701, subd. 1(b)(3)" (Act of May 27, 1949, c. 146, 63 Stat. 124), a provision affording exemption to "professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made." (J.A. 80, 81) There can thus be no doubt as to the basis upon which the Tax Court arrived at its decision and the petitioner's contention (Pet. Brief p. 5) that the Tax Court made no determination that professional or personal service transactions were involved is without substance.

STATUTES AND REGULATION INVOLVED

The pertinent statutory provisions are cited in the petitioner's brief. For the sake of completeness, however, the following Regulation of the Commissioners of the District of Columbia pertaining to Sales and Use Taxes should be here quoted:

"Sec. 202(b) 'INCONSEQUENTIAL ELEMENTS.' The Act exempts from the tax the gross receipts from professional, insurance, or personal service transactions which involve sales of tangible personal property as inconsequential elements and where no separate charges for such sales of tangible personal property are made. The phrase 'sales as inconsequential elements' shall be deemed to include any sales of tangible personal property made in connection with professional, insurance, or personal service transactions where the sales price of the tangible personal property is less than 10% of the amount charged for the services rendered in the transaction."

SUMMARY OF ARGUMENT

1. The decision of this Court in *Washington Times-Herald, Inc. v. District of Columbia*, *supra*, is correct, controlling and requires a decision in favor of the respondents, regardless of whether that case be deemed to overrule *Meyer v. Washington Times Co.*, 64 App. D.C. 218, 76 F. 2d 988, *cert. denied* 295 U.S. 734.

2. The Tax Court committed no errors, procedural or otherwise, warranting a reversal of its decision in these cases.

ARGUMENT

1. The Decision of This Court in *Washington Times-Herald, Inc. v. District of Columbia*, supra, is Correct, Controlling and Requires a Decision in Favor of the Respondents. Regardless of Whether That Case be Deemed to Overrule *Meyer v. Washington Times Co.*, 64 App. D.C. 218, 76 F. 2d 988, Cert. denied 295 U.S. 734

It is beyond dispute that the *Washington Times-Herald* case is on all fours with the facts in this case and involved the same issues. This was noted, as we have pointed out, by the Tax Court and it is not challenged by the petitioner. The decision of this Court in that case correctly applied the law to the facts before it. This Court recognized the applicability of the above cited "personal service" exemption. It recognized the "inconsequential value" of the mats to which title was transferred in the transaction. It recognized that the essence of the transaction was the sale by the syndicates of "the right to reproduce one time the work of artists who make the drawings" or, as this Court also expressed it, the sale of "the professional and personal services of the artists." Essentially such a transaction is little different from the writing of a prescription by a physician; in that case also there is the incidental transfer of title to a tangible object but the real value is in the services rendered. The mat is a convenient way of transmitting the artist's services just as the prescription blank is a convenient way of transmitting the physician's services.

The primary contention of the petitioner appears to be that the case at hand should be governed by the *Meyer* case. Although there are similarities between the two cases, the issues were entirely different. The earlier case had nothing to do with a sales or use tax, but instead involved a question of contract assignability. It is not necessary to a decision in our favor that the *Meyer* case be overruled. It is our position that the *Meyer* case, on its facts

and on the issues presented, is reconcilable with the *Washington Times-Herald* case.

The *Meyer* case involved the assignability of a contract under which Chicago Tribune Syndicate & Press Service, Inc., was to furnish The Washington Post Company with certain comic strips and articles for publication. A receiver was appointed for The Washington Post Company, who sold all of its assets to the plaintiff, among which assets was the aforementioned contract. This Court found the contract assignable.

The petitioner seizes upon certain remarks of the Court regarding the non-assignability of contracts "of a personal character" as support for its contention that the transactions under consideration here did not involve personal services. We think that the Court in the *Meyer* case correctly stated the applicable law when it said that the contract in that case was not "of *such* a personal character as to prevent it from passing under the circumstances and terms of the receivership sale." (Emphasis supplied.) In other words it cannot be said that all contracts involving personal services are non-assignable. The question is apt to be one of degree—of how highly personal the service is which is involved. To the extent that the Court went beyond this, we believe it engaged in dicta unnecessary to a determination of the case.

In the *Meyer* case, although mention is made of the assignment of the contract, the Court in its discussion makes it clear that what is primarily under consideration is the assignment of a right—namely, the transfer by the receiver to the plaintiff of the right to receive from the syndicate and publish the aforementioned comic strips and articles. The issue before the Court was whether the syndicate could properly object to the transfer of such right. The Court noted that the assignee had tendered cash to the syndicate, that there was nothing in the contract "requir-

ing the exercise of skill or peculiar qualifications on the part of the Post Company" and there was no "transfer of the contract rights to another and independent publication," but merely "the continuation of the same publication."

The above observations by the Court make it apparent that it was looking to the question of whether the transfer would vary the obligations of the syndicate or impair the syndicate's chances of obtaining performance by the transferee. This is essentially the test set forth in the Restatement of Contracts.

"§ 151. WHAT RIGHTS CAN BE EFFECTIVELY ASSIGNED.

"A right may be the subject of effective assignment unless,

- (a) the substitution of a right of the assignee for the right of the assignor would vary materially the duty of the obligor, or increase materially the burden or risk imposed upon him by his contract, or impair materially his chance of obtaining return performance, or
- (b) the assignment is forbidden by statute or by the policy of the common law, or
- (c) the assignment is prohibited by the contract creating the right."

This is also the test employed by text writers. (2 Williston, Contracts, Revised Edition, § 412; 4 Corbin on Contracts, § 865) The classic illustration is given by Williston as follows:

"A's promise to serve B as a valet can be performed only to B. If B were allowed to transfer his right to C, and C, whether called the agent of B or not, were permitted to demand that A should serve him, a new obligation would be created differing in substance from that which the obligor undertook. And the same is true of every contract for services involving a personal relation in rendering them." (p. 1178)

It cannot be disputed that the relation of a valet to his master is an infinitely more personal one than the relationship of a syndicate (or, for that matter, of a comic strip artist) to a newspaper publisher. Both involve personal services, but the relationship in the former case is so personal that an assignment of rights would presumably result in a change in duties whereas this would not be true in the latter case. This, it is submitted, is what the *Meyer* case stands for on its facts; it does not stand for the proposition that whenever a contract involves personal services the right to those services cannot be assigned.

The basic issue, as has been pointed out, is whether the assignment of the right would have the effect of varying the obligor's duties or risks. Such would be the effect of an assignment in many personal service cases but not in all.

That both the assignability of rights and the delegation of duties under personal service contracts are matters of degree is recognized by Williston.

"Personal responsibility may indeed in some cases prevent a bilateral contract from being assignable even in the limited sense in which that word is properly used—that is, it may prevent either the duty under the contract from being delegated, or the right under it from being assigned, but this will only be where either the right is so personal that it cannot be transferred, or the duty so personal that performance of it cannot be delegated to an agent, even though the original obligor still remains liable." (2 Williston, Contracts, Revised Edition, § 419) (Emphasis supplied.)

This is also recognized by the courts. *Canister Co. v. National Can Corporation*, 71 F. Supp. 45 (D.C. Dela. 1947) contains the following statement:

"Whiteside, New York Annotations to Restatement of Contracts, says, p. 60: 'This section restates in general terms the law of New York.' And, as stated be-

fore, New York law must be applied to test the assignability of the contract in suit. Under that law if the duty is not so personal as to be incapable of delegation and the defendant's burden under the contract not materially varied or increased or the chance of return performance diminished, then there is no impedimenta to assignability." (Emphasis supplied.)

There is, unfortunately, a dearth of cases in which the assignability of an obligee's right to have personal services rendered to him is in issue. Much more frequently the issue is whether the duty of the person required to render personal services is delegable. Corbin (*op. cit.* at p. 439) states as follows:

"In almost all cases where a 'contract' is said to be non-assignable because it is 'personal,' what is meant is not that the contractor's right is not assignable, but that the performance required by his duty is a personal performance and that an attempt to perform by a substituted person would not discharge the contractor's duty."

However, there are somewhat similar issues involved in the cases of assignment of rights and delegation of duties. It is in order, therefore, at this stage to point out that the courts have permitted the delegation of duties even though such duties may well be considered personal service duties. For example, in *Gribling v. Bohan*, 26 Cal. App. 771, 148 P. 530, although the court conceded that a contract by an artist to paint a portrait would be non-assignable, it permitted the assignment of a contract by a contractor to paint and finish a building. Similarly, in *Janvey v. Loketz*, 122 App. Div. 411, 106 N.Y.S. 690, the assignment of a contract for ordinary house painting was upheld. Also in *Devlin v. Mayor*, 63 N.Y. 8, cited by this Court in the *Meyer* case, a contract with the city for street cleaning was declared assignable.

It becomes apparent therefore that in respect both to the assignment of rights and delegation of duties the ques-

tion of whether or not "personal" services are involved must be answered on a relative and not an absolute basis. But this is because the issue of assignability is involved presenting an entirely different set of considerations than those involved in determining whether or not a sales and use tax exemption should apply. The "personal service" exemption of the District of Columbia Sales and Use Tax Act contains no requirement, explicit or implicit, that the relationship be a highly personal one such as would be involved in contracts to marry or to perform the services of a valet, or that the services be limited to those requiring a high degree of skill.

Furthermore, what was involved in the *Meyer* case was the transfer of the *entire* assets of the assignor. In such a situation the courts are apt to adopt a liberal approach in favor of assignability. The *Meyer* case quotes from *Dunkley Co. v. California Packing Corporation* (D.C.) 277 F. 989 as follows:

"The federal courts have treated situations like the present in a broad way and have allowed corporations succeeding to the business of a licensee to succeed to the license where the particular circumstances of the case warranted such a result."

Tolhurst v. Associated Portland Cement Manufacturers, (1903) A.C. 414, also cited by the Court in the *Meyer* case, likewise involved the transfer of a business—in that case the operation of a cement plant—and the Court supported assignability.

The following statement appears in *Gulf States Creosoting Co. v. Loving*, 120 F. 2d 195 (C.C.A. 4th 1941):

"The assignment was merely part of the transfer of assets to a corporation formed to take over a going business, and after the transfer, the same persons were in control. Under such circumstances, an assignment of a contract does not ordinarily fall within the rule that denies assignability where the personal element is a material factor."

A further point. Even if the *Meyer* case does support the view that the contract between the syndicate and the publisher was not a personal service contract (which we do not concede) it should be remembered that it is not required, in order for the sales and use tax personal service statutory exemption to apply, that there be a personal service "contract" between the vendor and vendee. It is merely required that there be a professional, insurance or personal service "transaction." This word is much broader and less technical than the word "contract." Statements to that effect have frequently been made by the courts, particularly in determining whether a counterclaim meets the requirement that it arise out of the transaction that is the subject matter of the suit. *Moore v. N.Y. Cotton Exchange*, 270 U.S. 593, 46 S.Ct. 367; *Coastal Produce Ass'n. v. Wilson*, 193 S.C. 339, 8 S.E. 2d 505; *United States Hoffman Machinery Corporation v. Ebenstein*, 150 Kan. 790, 96 P. 2d 661; *Warren v. DeLong*, 59 Nev. 481, 97 P. 2d 792; *Deagan v. Weeks*, 67 App. Div. 410, 73 N.Y.S. 641. The nature of the word "transaction" is well stated in *Moore v. N. Y. Cotton Exchange*, *supra*, as follows:

" 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much on the immediateness of their connection as upon their logical relationship."

Having the above in mind, it is easy to view the process by which a syndicate makes the work of an artist available to a publisher as a unified transaction, and, in this light, the transaction must be viewed as a personal service transaction. The syndicate in this situation is in reality a middleman who helps the artist to market his talent without the necessity of the artist's independently approaching a number of publishers. (Note that the Tax Court found in substance that the function of the syndicate is to obtain a market for the distribution of the artist's drawings. J.A. 76) If the word "transaction" is given the broad meaning which it should be accorded, this results in a

further reason for saying that the decision in the *Washington Times-Herald* case does no violence to the decision in the *Meyer* case.

One concluding observation should be made. The use taxes paid by Washington Times-Herald, Inc. (Nos. 13,008 and 13,009 before this Court) were paid with respect to the periods from March 1, 1951, through January 1952, and from April 1, 1953, through March 1954. (J.A. 72) The use taxes paid by Washington Times-Herald, Inc., which were before this Court in the *Washington Times-Herald* case were with respect to the period November 1, 1950, through February 28, 1951. (J.A., *Washington Times-Herald* case, 16) It will be noted that the taxes involved in the present case commenced with a period immediately subsequent to the period involved in the previous case. The Tax Court, doubtless influenced by this circumstance, makes the following statement in its opinion in the present case:

“Moreover, as far as the taxes assessed against Washington Times-Herald, Inc., are concerned, the doctrine of *res judicata* applies.” (J.A. 82)

In the case of *W. H. Atkinson Co. v. Brown*, 299 Mich. 315, 300 N.W. 102, the taxpayer successfully brought an action at law against the State of Michigan to recover a sales tax. No appeal was taken. Thereafter, the taxpayer successfully brought suit in equity to enjoin the Board of Tax Administration from collecting the tax for a later year. The opinion of the appellate court states as follows:

“The attorney general urges us to hold that:

‘The doctrine of *res judicata* should not be employed to thwart exertion of the sovereign power of taxation; and a prior judgment of 7 years standing, on an action to recover taxes paid under protest is not conclusive of a subsequent levy of the same tax upon the same person for a subsequent period.’

"We cannot place a time limit upon the rule *res judicata* for it operates for all time as between the parties when the same questions are subsequently presented.

"The court in the former adjudication held that, under the statute, plaintiff was not liable for the tax and awarded judgment for the return thereof, paid under protest. Without any change in the statute bearing upon such right the same questions are presented on the same but later facts, and we are asked to adjudicate anew between the parties."

The court held in favor of the taxpayer, applying the doctrine of *res judicata*.

In *Tait v. Western Maryland Railway Co.*, 289 U.S. 620, 53 S.Ct. 706, a leading case, the Commissioner of Internal Revenue and the United States Board of Tax Appeals had denied the right of a corporation to deduct from gross income for 1918 and 1919 the amortized proportion of the discount on sales of bonds by its predecessors. On appeal to the Circuit Court of Appeals, its right to such deduction was sustained. Subsequently its claims for deduction for amortization of the bond discount for the years 1920, 1921 and 1922 were denied. The Supreme Court held, in regard to the years 1920, 1921 and 1922, that under principles of *res judicata* the earlier judgment worked an estoppel against the United States in the later litigation. In so holding the Court said:

"As petitioner says, the scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status."

Accordingly, *res judicata* should be applied by this Court, in cases 13,008 and 13,009, concerning taxes assessed against Washington Times-Herald, Inc. There must at

some time be an end to this Court's being called upon to resolve identical questions of the statute's application to the same taxpayer.

2. The Tax Court Committed No Errors, Procedural or Otherwise, Warranting a Reversal of Its Decision in These Cases

Certain errors are alleged by the petitioners in regard to actions of the Tax Court. These are as follows:

(a) That the Tax Court made findings of fact based upon immaterial evidence.

Although it is not clear, it would appear that petitioner's objection is based upon the Tax Court's giving consideration to the value or sales price of the mats furnished respondents. (Pet. Brief pp. 11, 14, 25) That the Tax Court acted properly in considering such evidence is beyond doubt. Such value or sales price is an indispensable factor in determining the right to the aforementioned "personal service exemption" as set forth in the statute itself and in the implementing Regulation thereto. This was recognized by this Court in the *Washington Times-Herald* case.

Apparently petitioner claims that the only prices to which the Tax Court could look were the sales prices contained in the contracts between the syndicates and the respondents. This contention would have the effect of obliterating the statutory exemption. If the contracts did not show separately the mat value, there would be no way of ascertaining such value from those contracts. If the contracts did show separately the mat value, the statutory exemption would be lost because, for the exemption to apply, it is necessary that there be involved "sales as inconsequential elements *for which no separate charges are made.*" (Emphasis supplied.)

Apparently petitioner also claims that the fact that the statute defines "sales price" as being without deduction for the cost of the property sold, the cost of materials used, labor or service cost or any other expenses in some way

precludes a determination of the cost elements of the transaction. Here again such a position would automatically defeat the statutory exemption in question. Obviously the reason for the statutory definition of "sales price" is to prescribe the amount on which the tax is based if and only if the tax is applicable.

(b) That the Tax Court erred in failing to make a basic finding of fact essential to the determination of these cases.

Petitioner asserts that the Tax Court failed to make a necessary finding of fact in that it failed to find whether personal services were performed under the contracts involved. (Pet. Brief p. 27) As has already been pointed out, in its opinion the Tax Court stated that the *Washington Times-Herald* case was decided by this Court "under facts identical with those here present" and quoted this Court's discussion of the "personal or professional service exemption." This in itself was a sufficient finding by the Tax Court that personal or professional services were involved in the case at hand. Moreover, even if this is not a sufficient finding by the Tax Court that personal or professional services were involved, that should not affect the decision of this Court. It will be remembered, and petitioner concedes, (Pet. Brief pp. 27, 28) that the Tax Court, in the *Washington Times-Herald* case heretofore decided by this Court, had concluded that personal or professional services were *not* involved and yet that did not prevent this Court from deciding the case in favor of the taxpayer.

(c) That the Tax Court erred in not making separate findings of fact and conclusions of law.

Petitioner's brief makes the above contention (Pet. Brief pp. 33, 34), citing as authority Section 3 of Title IX of the District of Columbia Revenue Act of 1937 (Act of August 17, 1937, c. 690, as added May 16, 1938, c. 223, 52 Stat. 371, Act of July 26, 1939, c. 367, 53 Stat. 1108, Amendment of July 10, 1952, c. 649, 66 Stat. 543; Title 47, § 2403, D.C. Code, 1951, Supp. III). It is true that the cited section

requires that the Tax Court "shall make separate findings of fact and conclusions of law, and shall render its decision thereon in writing." But the Tax Court complied with these requirements. It did, it is conceded, write an opinion in which it incorporated its conclusions of law. However, the law does not prohibit opinions, or for that matter, deal with them at all. The sole requirement is that the findings of fact be separate from the conclusions of law. This requirement was complied with by the Tax Court as its findings of fact were separate from the conclusions of law, the latter being incorporated in its opinion.

It is interesting to note the similarity of Rule 52 of the Federal Rules of Civil Procedure which provides in part:

"(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . . ."

This Rule, however, goes on to provide that if "an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein." Furthermore, this Court has liberally interpreted the Rule. In *Smith v. Fletcher*, 80 U.S. App. D.C. 263, 152 F. 2d 20, it appeared that the lower court had erroneously called a finding of fact a conclusion of law. This Court in its *per curiam* decision stated that "this circumstance does not require us to reverse the judgment since it does not prevent us from understanding the basis and theory of the judgment."

Barnett v. Barnett, et al. (Court of Civil Appeals of Texas 1936), 98 S.W. 2d 215, cited by the petitioner (Pet. Brief p. 33) as grounds for reversal dealt with an entirely different situation, namely the failure of a trial court, despite request, to file any findings of fact or conclusions of law whatsoever.

Rule 34 of the Tax Court provides as follows:

“Rule 34—*Findings of Fact and Conclusions of Law*—In any proceeding before the Court the findings of fact may be either in numbered paragraphs or in narrative form; and the conclusions of law either may be stated separately in numbered paragraphs or may be incorporated in the opinion of the Court.”

The rule making authority of the Tax Court is as essential to its orderly and efficient functioning as that authority is to any court and should not be curbed except in the event of clear abuse. Rule 34 of the Tax Court, above quoted, to say the least, results in no such abuse.

(d) That the Tax Court erred in receiving in evidence the depositions of non-resident witnesses and in making findings of fact based thereon.

The above is urged by petitioner (Pet. Brief pp. 35, 36, 37, 38, 39).

But the Tax Court does have the authority which the petitioner claims should be denied it.

Congress has conferred upon the District of Columbia Tax Court the power to adopt and promulgate rules of procedure in matters for its determination. Act of August 17, 1937, c. 690, as added May 16, 1938, c. 223, 52 Stat. 374; Title 47, § 2408, D.C. Code, 1951. Pursuant to this authority, the Tax Court has provided in its rules that depositions shall be taken in hearings before it in accordance with rules relating to depositions in force in the United States District Court for the District of Columbia, in so far as such rules are applicable. (Rule 29). Rules 29 and 24 of the Tax Court also provide that depositions shall be mailed to the Tax Court and that testimony taken by deposition will not be considered until offered and received in evidence.

On due notice to petitioner, depositions of officers of certain syndicates were taken at the same time in New York City. These witnesses were located more than 100 miles from the District of Columbia. (J.A. 134, 145) Rule 26 of the Federal Rules of Civil Procedure, in force in the United States District Court for the District of Columbia, provides for the taking of depositions in such cases.

However, as depositions are not specifically mentioned in the above cited Act of Congress, petitioner evidently contends that the Tax Court had no authority to adopt rules authorizing their use.

It is settled in this jurisdiction that the power to make procedural rules embraces the power to make rules governing the taking and use of depositions. *Anacostia & Potomac R.R. v. Klein*, 8 App. D.C. 75 (1896). In that case it was stated by the Court that Section 770 of the Revised Statutes of the District of Columbia, 1875 ed. (Act of March 3, 1863, c. 91, 12 Stat. 763) conferred upon the Supreme Court of the District of Columbia "the express power to make all rules necessary to regulate the practice therein." Such power, the Court held, "clearly conferred" upon the Supreme Court of the District of Columbia the power to make and enforce rules providing for the taking and use of depositions in proceedings both at law and in equity.

Moreover, the power of the Supreme Court of the United States to promulgate rules authorizing the taking of depositions in Federal District Courts stems from statutory authority which does not mention depositions. The statute merely gave the Supreme Court the power "to prescribe, by general rules, . . . the practice and procedure in civil actions at law" and also authorized it to unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. Act of June 19, 1934, c. 651, 48 Stat. 1064, U.S.C., Title 28, §§ 723b, 723c; now U.S.C.A.

Title 28, § 2072. Accordingly, adoption by the Supreme Court of the Federal Rules in regard to the taking of depositions certainly indicates that Court is also of the opinion that the power to make procedural rules embraces the power to make rules governing the taking and use of depositions.

In addition to the above, it should be noted that administrative procedure "is, and should be, simpler, less formal and less technical than judicial procedure." *Sherwood Bros. v. District of Columbia*, 72 App. D.C. 155, 113 F. 2d 162. In the light of this, we would have an anomalous result if it were held that a court may authorize the taking of depositions pursuant to general authority to promulgate rules of procedure but an administrative body may not. In this connection note that petitioner has conceded that rules of procedure "should be designed to help, not hinder, the disposition of cases." (Pet. Brief p. 35)

One final point should be mentioned. Section 14-201 of the District of Columbia Code, 1951, specifically provides that the testimony of any witness may be taken in any civil cause "depending in any court of the District of Columbia, . . . by deposition . . . First. Where the witness lives beyond the District of Columbia." Act of March 3, 1901, c. 854, 31 Stat. 1354; Act of June 30, 1902, c. 1329, 32 Stat. 538. In 1938, many years after the adoption of this statute, the District of Columbia Board of Tax Appeals was created. Act of August 17, 1937, c. 690, as added May 16, 1938, c. 223, 52 Stat. 370; Title 47, § 2402, D.C. Code, 1951. More recently, in 1952, its name was changed to "District of Columbia Tax Court," and the designation of the sole member of the Board was changed to "Judge." Amendment of July 10, 1952, c. 649, 66 Stat. 547; Title 47, § 2402, D.C. Code, 1951, Supp. III.

It will be noted that at the time of taking the depositions in this case, the District of Columbia Tax Court was described as a court by a specific statutory provision and

another statute specifically authorized the taking of depositions in any civil cause depending in any court of the District of Columbia.

From the above it will be seen that the Tax Court committed no error.

CONCLUSION

It is respectfully submitted that the decisions of the Tax Court should be affirmed.

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BRIEF FOR PETITIONER

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

JANUARY TERM, 1956

FILED FEB 13 1956

No. 13, 007

Joseph W. Stewart
CLERK

DISTRICT OF COLUMBIA, Petitioner,

v.

THE WASHINGTON POST COMPANY,
Respondent.

No. 13, 008

DISTRICT OF COLUMBIA, Petitioner,

v.

WASHINGTON TIMES-HERALD, INC.,
Respondent.

No. 13, 009

DISTRICT OF COLUMBIA, Petitioner,

v.

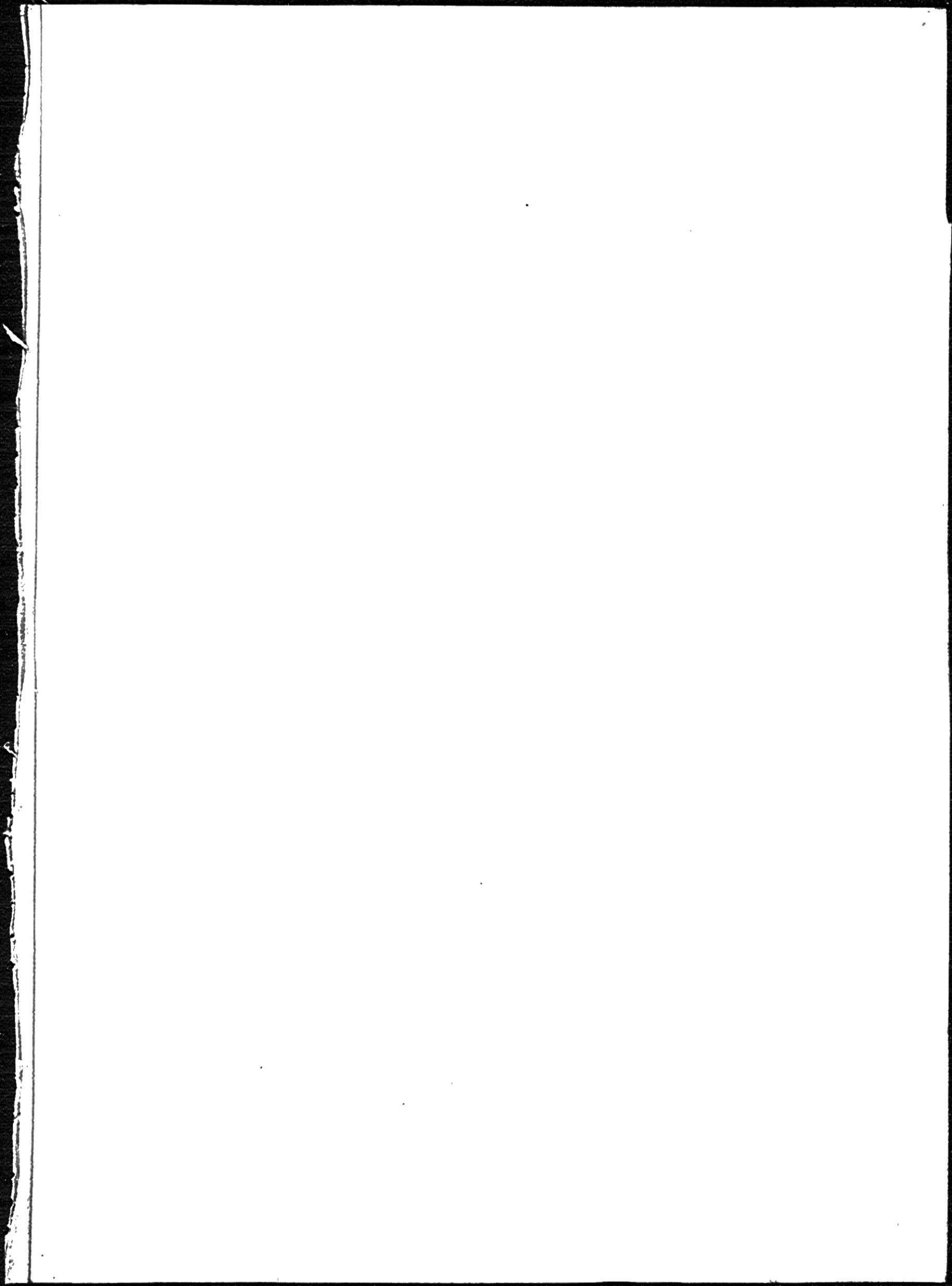
THE WASHINGTON POST COMPANY,
Respondent.

**ON PETITIONS FOR REVIEW OF DECISIONS OF THE DISTRICT OF
COLUMBIA TAX COURT**

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Tax Court erred in holding that this Court overruled and repudiated a case decided by this Court which held that a contract for the sale of comic strip mats, with the right to use such mats in the production of a newspaper, was a contract for the sale of merchandise, as a consequence of which holding by the Tax Court it held that sales of like mats under like contracts were personal service contracts and, as such, exempt from District of Columbia use taxes.

2. Whether the Tax Court followed proper procedure in making findings of fact, and in making findings of fact based upon immaterial and irrelevant evidence; whether the Tax Court erred in failing to make a basic finding of fact essential to proper decision of these cases; whether the Tax Court erred in failing to make conclusions of law; and whether in light of the many errors committed by the Tax Court its decisions are erroneous.

3. Whether the Tax Court erred in authorizing the taking of depositions of nonresident witnesses outside the District of Columbia for use as evidence in these cases when the Tax Court's governing statute does not provide for or allow such procedure or give the Tax Court authority to permit the taking and use of such depositions; whether the Tax Court erred in receiving such depositions in evidence,

and whether the Tax Court erred in making immaterial and irrelevant findings of fact based thereon and in using such findings as partial basis for its decisions in these cases.

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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

JANUARY TERM, 1956

No. 13,007

DISTRICT OF COLUMBIA, Petitioner,

v.

**THE WASHINGTON POST COMPANY,
Respondent.**

No. 13,008

DISTRICT OF COLUMBIA, Petitioner,

v.

**WASHINGTON TIMES-HERALD, INC.,
Respondent.**

No. 13,009

DISTRICT OF COLUMBIA, Petitioner,

v.

**THE WASHINGTON POST COMPANY,
Respondent.**

BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

By order of this Court entered December 19, 1955, these cases were consolidated for the purposes of filing briefs, of filing a single joint appendix, and for argument.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review decisions of the District of Columbia Tax Court^{1/} in sales and use tax cases pursuant to Sections 141(a) and 223 of the District of Columbia Revenue Act of 1949, 63 Stat. 112, 120, 128, ch. 146 (Secs. 47-2618 and 47-2713, D. C. Code, 1951), and Sections 3 and 4 of Title IX of the District of Columbia Revenue Act of 1937, as added by Sec. 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223, as amended by Sections 3(a) and 3(b) of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (Secs. 47-2403 and 47-2404, D. C. Code, 1951).

The decision of the Tax Court in case numbered 13,007 was entered October 3, 1955 (J. A. 83)^{2/}. The consolidated decision of the Tax Court in cases numbered 13,008 and 13,009 was entered September 30, 1955 (J. A. 93). Petitions for review by this Court of such decisions were seasonably filed on October 26, 1955 (J. A. 58, 92, 102).

STATEMENT OF THE CASES

These cases involve the application of the District of Columbia

1 The District of Columbia Tax Court will be referred to in this brief hereinafter as the "Tax Court".

2 The letters "J. A." in this brief refer to the joint appendix. The

Sales and Use Tax Acts, infra, to the use by respondents of certain tangible personal property purchased by them for use in the District of Columbia in the preparation of their newspapers in the District (J. A. 69, 72). The taxes were "use taxes" (J. A. 68, 72) assessed under the District of Columbia Use Tax Act, infra, which, inter alia, imposes a use tax upon every purchaser on the use of tangible personal property and services sold or purchased at retail sale as defined therein.

The respondents had executory contracts with certain syndicates, some of which are reproduced in the joint appendix (J. A. 103-132), which provided for the syndicates to furnish to the respondents various "features" consisting of comic strips and, in some cases, other "features" also such as dinner menus, sports columns, Dorothy Kilgallen's column, cross-word puzzles, fashions, nature stories, bridge articles, news, and various other features relating to humor, theaters, society, home-making, books, gardens, men's fashions, science, stamps and beauty (J. A. 116, 118, 125, 129). All these features, with some exceptions such as news reports, were furnished in proof or matrix form (J. A. 69, 75, 76, 103, 106, 112, 113, 117, 122, 126, 130). The syndicates carried out their contracts with the respondents by forwarding to the respondents

respective docket numbers in the Tax Court and in this Court are:

Tax Court Docket No.

This Court's Docket No.

1494

13,007

1495

13,008

1497

13,009

the matrix form (hereinafter referred to as "mat" or "mats") bearing the impressions of the current sequence of the comic strips. The respondents used the mats in the first of a series of operations culminating in the production of a semi-circular metal plate the size of a newspaper page from which the newspaper page containing the features, news articles and advertisements was printed. (J. A. 75.)

Most of the contracts between the syndicates and the respondents contained provisions, in varying forms, excusing the syndicates from liability in case the artist or author failed to furnish any feature covered by the contracts, and many of the contracts excused the syndicates from liability for failure to furnish any feature for other causes, as well, beyond the control of the syndicates, such as failures due to strikes, fire, floods, etc., and for adjustment of contract prices in such events (J. A. 76, 104, 107, 119, 122, 123, 126, 127, 130, 131, Pet. Ex. 55 to 86). Such contracts also provided, in varying forms, for their assignment by the respondents to others, and in some cases prohibited the sale or other disposition by the respondents of any features furnished thereunder without written consent of the syndicates (e.g., agreement between New York Tribune, Inc. and The Washington Post of June 14, 1938, J. A. 111-116; agreement between King Features Syndicate, Inc. and The Washington Post of May 18, 1943, J. A. 117-121; agreement between Chicago Tribune-New York News Syndicate, Inc. and the Times-Herald, Inc. of July 12, 1949, J. A. 122-125, and similar contracts between the same

parties dated July 3, 1952, J. A. 126-129, and June 15, 1953, J. A. 130-132).

The respondents seasonably appealed to the Tax Court from the assessments of use taxes against them and claimed that they were not liable for such taxes on the following grounds (J. A. 5, 88, 89, 98):

(1) That the contracts involved were professional or personal service transactions which involved sales as an inconsequential element for which no separate charges were made and were thus exempt under the District of Columbia Use Tax Act.

(2) That the transactions involved no use or consumption of any tangible personal property or purchase or sale of services and consequently were not taxable under the District of Columbia Use Tax Act.

The Tax Court did not make a finding of fact on the evidence adduced as to whether the contracts involved were or were not professional or personal service transactions, which was essential to the making of a proper conclusion of law, nor did the Tax Court make a conclusion of law on the matter which was required by the Tax Court's governing statute as will hereinafter appear. The Tax Court simply decided these cases on the theory that this Court's decision in Washington Times-Herald, Inc. v. District of Columbia, ___ U.S. App. D.C. ___, 213 F. 2d 23, overruled or repudiated this Court's decision in Meyer v. Washington Times Co., 64 App. D. C. 213, 76 F. 2d 988, cert. denied 295 U. S. 734. The Meyer case held that a contract of the same kind

here involved, and which was of the same kind as those involved in the Washington Times-Herald, Inc. case, supra, was for the sale of merchandise, and that the contract for personal services was the one between the artist, who conceived the comic strip, and the syndicates (J. A. 80-82).

This Court's decision in Meyer v. Washington Times Co., supra, is digested under "assignments", "corporations", "injunctions" and "torts". This Court's later decision in the Washington Times-Herald, Inc. case, supra, is digested under "licenses". The Meyer case was unknown to counsel for the District of Columbia until after the decision was made by this Court in the Washington Times-Herald case. No reference to the Meyer case appears in the briefs of the parties or the decision of the Court in the Washington Times-Herald case. It is the belief of counsel for the District of Columbia that this Court was not aware of and did not consider the Meyer case when its conclusions were reached in the Washington Times-Herald case. It is further the belief of counsel for the District of Columbia that the decision of this Court in the Meyer case was a correct determination of the nature of transactions of the kind here involved in respect of the sale of comic strip features to the respondents for reproduction in their newspapers, and that upon a reconsideration of this matter this Court may reach a conclusion corresponding to that reached in the Meyer case, particularly in light of the fact that three of the judges of this Court who considered the later Washington Times-Herald case were of the view that the transactions there involved were not the purchase or

sale of services. In fact, it is the alternative contention of the respondents in these cases, as set forth above, that the contracts did not involve "purchase or sale of services."

In addition, these cases were brought to this Court for review because of procedural and evidentiary errors which it is believed were committed by the Tax Court in its determination of the controversy before it. That Court, over objection of counsel for the District of Columbia (J. A. 60, 61), permitted respondents to take in New York City, New York, depositions for the purpose of use at the hearing of these cases by the Tax Court (J. A. 65, 66), and, over the objection of counsel for the District of Columbia (J. A. 40-42; J. A. 16-19, 23, 26, 27, 29, 30, 45-50; J. A. 67, 68), received the depositions containing immaterial and irrelevant facts in evidence in these cases. It is the contention of the District of Columbia that the action of the Tax Court in proceeding to a disposition of these cases in reliance, at least in part, upon depositions of persons taken in the City of New York was error and without statutory authority. The Tax Court made findings of fact which it characterized as "additional facts" (J. A. 74) regarding the "Value or Sales Price of Mats" (J. A. 76-78, Findings 6, 7) which were furnished to respondents by the syndicates under the contracts involved. These findings were based upon evidence relating to the costs of the syndicates and costs of those who furnished services, materials and supplies to the syndicates in producing the mats later sold to the respondents under agreements wholly unrelated

to the agreements here involved between the syndicates and the respondents. Such evidence was received by the Tax Court over the objection by counsel for the District of Columbia as heretofore shown. It is the further contention of the District of Columbia in these cases that the admission by the Tax Court of such evidence, which pertained only to the costs incurred by the syndicates in manufacturing or causing to be manufactured the mats which were sold and furnished to the respondents, with the right to use such mats in the production of respondents' newspapers, and the use of such evidence as the basis for its decisions in these cases, was error which requires reversal of the decisions of that Court.

STATUTES INVOLVED

The following provisions of the District of Columbia Use Tax Act and the District of Columbia Sales Tax Act, 63 Stat. 112, 124, ch. 146 (Title 47, Chap. 26 and Chap. 27, D. C. Code, 1951), are involved:

(1) The following portions of Sec. 201 of the District of Columbia Use Tax Act, supra (Sec. 47-2701, D. C. Code, 1951):

"Section 201. (a) 'Retail sale', 'sale at retail', and 'sold at retail' means all sales in any quantity or quantities of tangible personal property, whether made within or without the District, and services, to any person for the purpose of use, storage, or consumption, within the District, taxable under the terms of this title. * * *

"(b) The terms 'retail sale', 'sale at retail', and 'sold at retail' shall not include the following: * * *

"(3) Professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made."

(2) Section 212 of said Act (Sec. 47-2702, D. C. Code, 1951):

"Sec. 212. Beginning on and after the first day of the first month succeeding the sixtieth day after the approval of this Act, there is hereby imposed and there shall be paid by every * * * purchaser a tax on the use, storage, or consumption of any tangible personal property and services sold or purchased at retail sale. The tax hereby imposed shall be at the rate of 2 per centum of the sales price of the tangible personal property or services rendered or sold."

(3) The definitions of "tangible personal property" and "sales price" in Secs. 119 and 116 of the District of Columbia Sales Tax Act, supra (Secs. 47-2601-19 and 47-2601-16, D. C. Code, 1951), which are incorporated in and made applicable to the District of Columbia Use Tax Act under Sec. 210 of the latter Act (Sec. 47-2701-10, D. C. Code, 1951):

"Sec. 119. 'Tangible personal property' means corporeal personal property of any nature."

"Sec. 116. (a) 'Sales price' means the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

"(1) The cost of the property sold.

"(2) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.

"(3) * * * The total amount of the sales price includes all of the following: a. Any services that are a part of the sale. * * *".

(4) Sections 202, 203 and 206 of the District of Columbia Use Tax Act (Secs. 47-2701-2, 47-2701-3 and 47-2701-6, D. C. Code, 1951):

"Sec. 202. 'Purchase' and 'purchased' shall mean and include--

"(a) any transfer, either conditionally or absolutely, of title or possession or both of the tangible personal property sold at retail;

"(b) any acquisition of a license or other authority to use, store, or consume, the tangible personal property sold at retail;

"(c) any sale of services sold at retail."

"Sec. 203. 'Purchaser' means any person who shall have purchased tangible personal property or services sold at retail."

"Sec. 206. 'Use' means the exercise by any person within the District of any right or power over tangible personal property and services sold at retail, whether purchased within or without the District by a purchaser from a vendor."

Section 3 of Title IX of the District of Columbia Revenue Act of 1937, as amended, supra (Sec. 47-2403, D. C. Code, 1951, Supp. II), in material part as follows:

"3. Any person aggrieved by any assessment by the District against him of any * * * ~~inheritance~~ * * * tax or taxes, or penalties thereon, may, * * * appeal from such assessment to the board, provided such person shall first pay such tax, * * *. The board shall hear and determine all questions arising on said appeal and shall make separate findings of fact and conclusions of law, and shall render its decision thereon in writing. The board may affirm, cancel, reduce, or increase such assessment."

STATEMENT OF POINTS

1. The District of Columbia Tax Court clearly erred in holding that the United States Court of Appeals for the District of Columbia Circuit overruled and repudiated the case of Meyer v. Washington Times Company, 64 App. D. C. 218, 76 F. 2d 988, cert. denied 295 U. S. 734 and, as a consequence, in holding that the sale of newspaper features by various syndicates to The Washington Post Company and the Washington Times-

Herald, Inc. were personal service transactions within the meaning of the District of Columbia Use Tax Act.

2. There was no competent, relevant or material evidence upon which the District of Columbia Tax Court could base additional findings of fact relating to the "sales price" of comic-strip matrices which constituted newspaper features sold by syndicates to The Washington Post Company and Washington Times-Herald, Inc. other than the sales price contained in the respective contracts for the sale of such newspaper features by the syndicates to The Washington Post Company and Washington Times-Herald, Inc. and, therefore, additional Findings of Fact 6 and 7 containing alleged "Value or Sales Price of Mats" and "Percent of Weekly Charges" are clearly erroneous and the Tax Court's decision based on such findings of fact is, likewise, erroneous and should be reversed.

3. There was no competent, relevant or material evidence, except the contracts referred to in additional Finding of Fact 2, upon which additional Finding of Fact 3 could be based and, consequently, all of additional Finding of Fact 3, except the last two sentences thereof, is clearly erroneous.

4. The District of Columbia Tax Court did not make separate findings of fact and conclusions of law as required by law. The District of Columbia Tax Court had no authority to authorize the procurement of evidence by deposition outside the District of Columbia. The District of Columbia Tax Court further erred in receiving into evidence the transcript of oral testimony taken by such deposition, in making clearly erroneous

findings of fact based upon such deposition, and in entering its decisions based upon evidence adduced through such deposition, and as a result thereof said decision is erroneous because it deprives the District of Columbia of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

5. The District of Columbia Tax Court erred in determining that the taxes involved were erroneously assessed, in reversing the action of the Assessor in denying the claim for refund thereof, and in entering a decision, as a result of such determination, that the respondent is entitled to a refund of such taxes and interest.

SUMMARY OF ARGUMENT

This Court held in Meyer v. Washington Times Co., supra, that a contract for the sale of comic strip mats, with the right to use such mats in the production of a newspaper, was not a contract for personal services but, on the contrary, a contract for the sale of merchandise, and that such contract was therefore assignable, even though there was no specific provision in the contract permitting assignment. The contracts involved in the present cases for the sale of comic strip mats and other newspaper features are in material aspects the same as the contract in the Meyer case, except that the contracts in these cases contain specific authority for assignment. All personal services furnished and required incident to the production of the comic strip mats had been **fully** completed when the mats were appropriated to the contracts in

question. The comic strip mats involved were clearly tangible personal property. The respondents purchased such mats for use in the District within the meaning of the District of Columbia Use Tax Act which defines "purchased" to include any transfer, conditionally or absolutely, of title or possession of tangible personal property and the acquisition of a "license or other authority" to use such property. The transfer of the comic strip mats with the license or authority to use them to the respondents under the contracts, coupled with the physical use, as "use" is defined in the statute, by the respondents, subjects the respondents to the District of Columbia use tax.

The Tax Court's decisions to the effect that the transactions involved are exempt from the use tax on the theory that they are "personal service" transactions are clearly erroneous. Neither of the two statutory requisites for exemption was met. The first requirement for exemption was that the transactions be for "personal service". The undisputed evidence shows that no personal service of any kind was required to be performed under the contracts. The Tax Court did not make a finding of fact one way or the other on this requirement for exemption; that Court simply assumed that the contracts were for personal services on the basis of this Court's decision in Washington Times-Herald, Inc. v. District of Columbia, supra. The second requirement for exemption from the tax was that the "sales price" of the tangible personal property sold and used is less than 10⁰/o of the amount charged for

services rendered. The evidence shows, first, that no services were rendered under the contracts involved. Secondly, the tax statute defines "sales price" to mean the total amount paid as consideration for the sale without any deduction for the cost of the property sold, or the cost of materials used, or the costs of services or labor, or any other expenses. The Tax Court disregarded the statutory definition and made findings of fact as to the value of the comic strip mats which were based upon evidence, admitted over objection of counsel for the District, which related to part of the costs of the respondent's vendors in producing the mats for sale, and designated such findings as the value or "sales price" of the mats. This was clear error. The only "sales price" involved was the weekly charge paid under each contract by each respondent to the syndicates for the comic strip mats and other newspaper features, with the right of respondents to use such mats in the manufacture of newspapers. The statutory definitions pointed out have not been given effect in the decisions of these cases and the Washington Times-Herald, Inc. case, supra. Contracts of the kind here involved are not for the purchase or sale of personal services, as recognized in the Meyer case, supra, and by three of the judges who participated in the decision of the Washington Times-Herald case. The present cases were decided upon a misunderstanding of the law and should be reversed.

The Tax Court followed clearly erroneous procedure in taking and admitting evidence, in making findings of fact, and in entering its decisions

in these cases. These cases were decided by the Tax Court (1) on an assumption, contrary to fact, that the contracts between the syndicates and the respondents were "personal service" transactions, and (2) upon immaterial and irrelevant evidence adduced by testimony, depositions and exhibits relating to the costs of the syndicates and the costs of those who furnished services, materials, and supplies to the syndicates in producing the mats later sold to the respondents in disregard of the statutory exclusion of such and similar costs and expenses. This was done by the Tax Court apparently in the belief that this Court, by its decision in Washington Times-Herald, Inc., supra, sanctions such procedure. Such a belief is clearly an erroneous view of the law and of this Court's decision in that case.

Depositions were unknown to the common law. The right to take and use depositions is entirely dependent upon statutory authority therefor. The District of Columbia Tax Court has no such authority. Although the Congress has, for example, provided authority for the taking of depositions in proceedings before the judges of the United States Tax Court and for the taking of interrogatories and cross-interrogatories of nonresident witnesses in proceedings before the Municipal Court for the District of Columbia, Congress has not made similar provision in respect of proceedings before the District of Columbia Tax Court, or for the payment of fees and expenses of such witnesses and others. The Tax Court, therefore, clearly erred in authorizing the taking of depositions of nonresident witnesses

in these cases, in receiving such depositions in evidence, in considering such depositions, and in basing its findings of fact and decisions, in part, thereon.

Failure of the Tax Court to comply with plain statutory requirements in respect of its proceedings and determinations, in the making of erroneous findings of fact, in not making conclusions of law, in exceeding its authority by permitting depositions of nonresident witnesses to be taken outside the District of Columbia and to be used in the hearing before it, and in entering decisions in these cases without such compliance, deprives the District of property without due process of law and such decisions should be reversed.

ARGUMENT

I

The Tax Court erred in holding that this Court overruled Meyer v. Washington Times Co., supra, and in holding that sales of newspaper features to respondents were personal service transactions and thus exempt from District of Columbia use taxes.

Section 212 of the District of Columbia Use Tax Act, supra, imposes a tax, inter alia, upon the use of any tangible personal property purchased at retail sale at the rate of 2 per centum of the sales price of such sale. Section 201(a) of the Act defines retail sale to mean, with certain exceptions not here material, all sales of tangible personal property, whether made within or without the District, and services, to any person for the purpose of use within the District.

The word purchased is defined in Section 202 of the Act to mean and include, inter alia, any transfer, either conditionally or absolutely, of title or possession or both of the tangible personal property sold at retail as well as any acquisition of a license or other authority to use the tangible personal property sold.

Tangible personal property is defined in Section 119 of the District of Columbia Sales Tax Act, supra, to mean corporeal personal property of any nature, and the sales price referred to in Section 212 of the Use Tax Act, upon which District use taxes are based, is defined in Section 116 of the Sales Tax Act to mean the total amount paid by a purchaser to a vendor as consideration

for a retail sale without any deduction on account of (1) the cost of the property sold or (2) the cost of materials used, labor or service cost, or any other expenses. These definitions are made applicable to the use tax by Section 210 of the Use Tax Act.

The word use is defined in Section 206 of the Use Tax Act to mean, inter alia, the exercise by any person within the District of any right or power over tangible personal property sold at retail sale.

Section 201(b)(3) of the Use Tax Act excludes from the definition of "retail sale" and thereby exempts from the use tax, inter alia, personal service transactions which involve sales as inconsequential elements for which no separate charges are made. The requirements for this specific exemption are that (1) the retail sale must be one for personal services and (2) involve sales as inconsequential elements for which no separate charges are made. The Commissioners of the District of Columbia have promulgated a Regulation applicable to the second requirement for exemption as follows:^{3/} "The phrase 'sales as inconsequential elements' shall be deemed to include any sales of tangible personal property made in connection with professional, insurance, or personal service transactions where the sales price of the tangible personal property is less than 10⁰/o of the amount charged for the services rendered in the transaction." Under the well-established doctrine of strict

³ Published in par. 64-005(b), DCCT (District of Columbia Tax Reports, Commerce Clearing House, Inc.).

construction of exemption provisions of statutes^{4/} both requirements must be fully met in order to obtain the exemption and any doubt in respect thereto must be resolved in favor of the Government.

The respondents claimed exemption from the taxes here involved before the Tax Court on the ground that the contracts between them and the syndicates, by which the syndicates furnished fibrous mats containing impressions of comic strips to the respondents with the right to use such mats in preparing respondents' newspapers, were "personal service" transactions. Based upon this assumption, which is founded upon this Court's opinion in Washington Times-Herald, Inc. v. District of Columbia, supra, the respondents proceeded to and applied the following theory in support of their claim to tax exemption (Par. 6(d) of each appeal filed with the Tax Court, J.A. 6, 90, 100):

"(d) The prices paid by Petitioner under said contracts were greatly in excess of the value of blank fiber matrices, being, with respect to each feature, much more than ten times the value of the fiber matrix with no artist's impression upon it."

⁴ Ford v. Delta & Pine Land Co., 164 U.S. 662, 666, 41 L. Ed. 590, 592;
Chicago Theological Seminary v. Illinois, 188 U.S. 662, 672, 47 L. Ed. 641, 648;
Washington Chapter of the American Institute of Banking v. District of Columbia, 92 U.S. App. D.C. 139, 203 F. 2d 68;
Hebrew Home for the Aged v. District of Columbia, 79 U.S. App. D.C. 64, 142 F. 2d 573;
Combined Congregations of the District of Columbia v. Dent, 78 U.S. App. D.C. 254, 140 F. 2d 9.

In respect of the basic test for the exemption claimed examination of the contracts between the syndicates and the respondents clearly discloses that none of such contracts provided for personal services to be performed by any of the syndicates or by any one else. Such contracts provided for the several syndicates to furnish to the respondents various newspaper "features" principally "in proof or matrix form" and gave to respondents the right to use the proofs or mats in producing their newspapers as well as the right of assignment of the contract rights. A contract of the same kind, but which did not contain specific provision for assignment, was involved in the case of Meyer v. Washington Times Co., supra, as to which the Tax Court stated (J. A. 81):

"* * * It was claimed there that the contracts were for personal services. The Court of Appeals held otherwise; that the contracts were for the sale of merchandise; and that the contract for personal services was the one between the artist, who conceived the comic strip, and the syndicate."

Justice Bailey of the then Supreme Court of the District of Columbia, who decided the Meyer case in that Court, had this to say^{5/}

"I do not think that the contract between the old Post Company and the Tribune Company was assignable. The agreement was in effect a license

⁵ Tr. of Record, p. 43, Meyer v. Washington Times Co., No. 6198, Vol. 483 Records & Briefs, United States Court of Appeals for the District of Columbia.

to the Post Company to publish certain copyrighted matter, and the furnishing of the matrices or plates was merely incidental to the license to publish."

The contract there involved was between the Tribune Company and the Washington Post Company and was dated February 9, 1932; its text is reproduced, for the convenience of this Court, in an appendix to this brief. That contract is in material aspects the same as the contracts here involved, except that it does not have specific provision for its assignment as do the contracts in the present cases. It is pertinent to note here that two of the contracts in the present cases were made in the years 1937 and 1938 (J. A. 106, 111).

The contract in the Meyer case was also the subject of a suit filed in the Supreme Court of New York. This Court reversed Justice Bailey's decision and stated in its opinion:

"We agree with the holding of the New York court that the contract in the present case was assignable. As said by Mr. Justice Schmuck: 'The contract is assignable unless of a personal character, as a promise to marry, or one requiring skill, science, or peculiar qualifications. The contract here considered requiring on the one hand forwarding of matrices and on the other use of ordinary mechanical appliances, for the purpose of manifold reproduction, cannot be said to call into play other than knowledge of the use of ordinary implements. Viewed from every angle, even with prejudiced eyes, this contract cannot be tagged as nonassignable. Considering the credit feature of the agreement, a like conclusion is reached. In re Niagara Radiator Co. (D. C.) 164 F. 102, it was held that if nonassignability is not inhibited, the credit

extending to the vendee does not make it so, provided the assignee is ready to pay cash.'

"It is insisted, however, that this is not strictly a contract but in the nature of a license to use and publish copyrighted material. Whatever may be the effect of such a license between the Tribune Company and the artists producing the comics in question may be disregarded, since the contract involved is not with the artists but with the Tribune Company for the sale of the merchandise to one of its customers. There is nothing in the terms of the contract to forbid its assignment, nor is the contract of such a personal character as to prevent it from passing under the circumstances and terms of the receivership sale. There is nothing in this contract requiring the exercise of skill or peculiar qualifications on the part of the Post Company. It was merely a contract in the form employed by the Tribune Company in furnishing these comics to a multitude of publishers throughout the country. It amounted merely to one instance of a general series of transactions, divesting the contract of every element of nonassignability." (Underlining supplied.)

In respect of the limitation in the contract in the Meyer case which authorized sale of the rights thereunder only upon "first obtaining in each instance the written consent of the Publisher", which limitation is contained in varying forms in the contracts here involved, counsel for the appellant (Washington Post Company) stated (App. Br., p. 42): "The intention is that the publisher should be the ultimate user of the material," and that the "purpose" was "to prevent the subscriber from competing with the publisher in the sale or disposition of the material."

In these cases we are dealing with use of a product under contracts for the sale of merchandise whose provisions and purposes are well-understood by those engaged in the newspaper publishing

business. Insofar as the syndicates, who manufacture and sell the mats, and the newspaper companies, who buy and use the mats, are concerned, there is not one element of "personal service" provided under the contracts. All personal services furnished and required incident to the production of the mats had been fully completed when the mats were appropriated to the contracts. While the syndicates undoubtedly had personal service contracts with the artists and authors for drawing and writing the newspaper features sold under the contracts here involved, such personal service contracts are wholly separate and apart from the contracts in these cases. Furthermore, executory contracts for the performance of personal services are not assignable by any party unless the other consents thereto. 4 Am. Jur., Assignments, Secs. 8, 9. This point was fully argued in the briefs in the Meyer case and needs no repetition here.

The remaining test for exemption likewise has not been met. If it is erroneously assumed, as did the Tax Court in these cases (J.A. 68), that the contracts involved are personal service transactions, it is a further requisite of exemption that the "sales price" of the tangible personal property is less than 10⁰/o of the amount charged for the services rendered. In this aspect of the case the Tax Court made findings of fact in Findings 6 and 7 (J.A. 76-78) showing the "Value or Sales Price of Mats" to be, in every case, less than 10⁰/o of "Weekly Charges" under the contracts, and then stated in its opinion, without benefit of a conclusion of law as required by statute,

that (J. A. 79):

"The physical or material value of the mats or matrices furnished the petitioners by the syndicate was in no instance in excess of four per cent of the amount charged for the services rendered petitioner under the contracts between petitioners and the particular syndicate. "

The Tax Court's findings as to the value of the mats were based upon wholly irrelevant evidence, admitted over the objection of counsel for the District (J. A. 16-50), which related to part of the costs of the syndicates in producing the mats for sale, i. e., the cost of the "raw" mat and for photoengraving (J. A. 9, 10, 16, 17, 21, 22-37, 45-50, 136-141, 148, 149). The evidence referred to shows that most of the work of manufacturing the mats, which included materials and services, was done by other commercial concerns for the syndicates, so that even the syndicates in most cases did not furnish any services in manufacturing the mats.

The "Weekly Charges" referred to in Findings 6 and 7 by the Tax Court are in fact the respective amounts paid by respondents under the contracts here involved (J. A. 44). As to such charges the Judge of the Tax Court inquired of the witness Robert P. Thome, an employee of The Washington Post Company (J. A. 43, 44):

"The Court: What do you get in return?"

The witness responded:

"The Witness: You get the mat and the right to publish it, to reproduce it. "

The witness Thome further explained (J. A. 52-54) that after the respondent received the comic strip mat the respondent used it to make a metal cast of a newspaper page--a mechanical process--from which the newspaper page was printed.

The "Weekly Charges" referred to above, and nothing else (J. A. 147), was the contract price under the contracts involved. Such price was the "sales price", and the only sales price involved in these cases which the statute involved defines to mean the total amount paid as consideration without any deduction for the cost of the property sold, or the cost of materials used, or the cost of service or labor, or any other expenses. It was consequently clear error for the Tax Court to consider evidence pertaining to such costs and to base its decisions upon it.

The comic strip mats involved were clearly tangible personal property as defined in Sec. 119 of the Sales Tax Act, supra. The respondents purchased such mats for use in the District within the meaning of the definition of "purchased" in the Use Tax Act, which includes any transfer, conditionally or absolutely, of title or possession of such tangible personal property, and the acquisition of a "license or other authority" to use such tangible personal property. Consequently, the transfer of the corporeal property (the mat), and the license or authority to use it, to the respondents under the contracts, coupled with the undisputed use,

defined by the statute to mean the exercise of any right or power over tangible personal property in the District, by the respondents in the District, subjects the respondents to the use tax based upon the "sales price" aforesaid.

The statutory definitions pointed out above were not given effect under the decision of this Court in the case of Washington Times-Herald, Inc. v. District of Columbia, supra. It is respectfully submitted that, for this reason, and for the reason that contracts of the kind here involved are not for the purchase or sale of personal services, as recognized by three of the judges who participated in the decision of that case, Washington Times-Herald, Inc. v. District of Columbia, supra, was decided upon a misunderstanding of the law and should be reversed.

The Tax Court erred in failing to make requisite findings of fact, erred in authorizing the procurement of evidence by deposition outside the District of Columbia, erred in receiving and considering evidence taken by such depositions, erred in failing to make conclusions of law, and its decisions are erroneous because they deprive the District of Columbia of property without due process of law.

The Tax Court had before it a question of exemption from use taxes which required a finding of fact as to whether personal services were performed under the contracts involved. No such finding was made. The evidence shows, as pointed out above, that no personal services were performed under the contracts between the syndicates and the respondents. A finding to this effect was required. Furthermore, the Tax Court did not make a conclusion of law as required by its governing statute. In the case of Washington Times-Herald, Inc. v. District of Columbia, supra, the late Judge Lawrence Koenigsberger made a conclusion of law (J. A. 8 in that case) that the transactions there involved were not "personal service transactions" within the meaning of Section 201(b)(3) of the Use Tax Act, supra. After Judge Koenigsberger's death the case came on for reconsideration before the present Judge of the Tax Court and the following finding of fact was made (J. A. 17 of that case):

"The value and sales price of the matrices (also known as 'mats') mentioned and described in paragraph 5 of the original findings of fact were less than ten per cent of the amount charged for the services

rendered the petitioner under the contracts mentioned in those findings of fact."

Although such finding was made, it was, as in the present cases, based upon irrelevant and immaterial evidence. Such finding played no part in the Tax Court's decision of that case, however, because of the Court's own view that it was not material to decision of the case. The Tax Court stated in its opinion (J. A. 19 of that case):

"* * * While this finding was made the Board does not believe that it is determinative of the issue of law here present, because the services performed by the syndicates and companies supplying the features were not those contemplated by Section 201(b)(3) of the Act, in that they were not 'professional, insurance or personal service transactions.' The Board believed that, in the event of appeal, the petitioner was entitled to have such finding made, notwithstanding it did not determine the question presented."

This Court, however, used the finding above quoted as the basis for its decision reversing the Tax Court.

This Court did not have presented to it for decision in the Washington Times-Herald, Inc. case, supra, the question whether the Tax Court's finding of fact, quoted above, was based upon irrelevant and immaterial evidence and consequently did not decide that question, or the question whether such finding was clearly erroneous. The evidence upon which Findings 6 and 7 in these cases was based was of the same character as that upon which the finding, quoted above, was made in the Washington Times-Herald, Inc. case, supra, and, upon objection by counsel for the District, the Tax Court held that

such evidence was immaterial and irrelevant but later admitted it (J. A. 45):

"Mr. Updegraff: I object to this testimony as immaterial and irrelevant.

"The Court: I think so. I sustain it. What is the purpose of it?

"Mr. Bradley: I simply asked him if he had occasion to use a raw mat. The next question, will be whether he buys a raw mat and next what he pays for it. The Court of Appeals indicated, quoted testimony in that case as to what they paid for raw mats. That is why I think it is relevant.

"The Court: You didn't ask him that. All right. * * *

"Mr. Updegraff: I object on the same basis, the same grounds that I objected to the prior testimony set forth at the outset of this trial, and with respect to Petitioners' Exhibit 48. * * *"

It is clear from the record that the Tax Court decided these cases (1) on an assumption, contrary to fact as shown by the evidence, that the contracts between the syndicates and the respondents were "personal service" transactions, and (2) upon immaterial and irrelevant evidence adduced by testimony, depositions and exhibits relating to the costs of the syndicates and the costs of those who furnished services, materials and supplies to the syndicates in producing the mats later sold to the respondents under agreements wholly unrelated to the contracts here involved in utter disregard of the statutory exclusion of such and similar costs. This was done by the Tax Court apparently in the belief that this Court, by

its decision in Washington Times-Herald, Inc., supra, sanctions such procedure. Such a belief is clearly an erroneous view of the law and of this Court's decision in that case.

In Saginaw Broadcasting Co. v. Federal Communications Commission, 68 App. D. C. 282, 96 F. 2d 554, cert. denied 305 U. S. 613, this Court stated:

"The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts.

"In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or

underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion. For example, before the Communications Commission may grant a construction permit it must, under the statute, be convinced that the public interest, convenience, or necessity will be served. An affirmative or negative finding on this topic would be a finding of ultimate fact. This ultimate fact, however, will be reached by inference from basic facts, such as, for example, the probable existence or non-existence of electrical interference, in view of the number of other stations operating in the area, their power, wave length, and the like."

In Shapiro v. Rubens (C. C. A. 7, 1948), 166 F. 2d 659, the

Court stated:

"* * * The failure to find the ultimate fact is deemed a finding against the party having the burden of proof * * * and on appeal, all facts not embraced in special findings will be regarded as not proved by the party having the burden of the issue. The failure to find a fact essential to a recovery is equivalent to a finding against the party having the burden of proving the same."

In Woods v. Turner (C. C. A. 10, 1949), 172 F. 2d 313, the trial court did not make a specific or basic finding material to the issue presented. The Circuit Court of Appeals held:

"The absence of such a finding is the equivalent of a finding thereon against plaintiff since he had the burden of establishing that the tenants were required to rent such lots as a part of the rental of the housing accommodations."

In United States v. Forness, et al. (C. C. A. 2, 1942), 125 F. 2d 928, 942, it was stated:

"There were included in the record proposed findings and objections thereto. This was improper.
* * *.

"We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.' Chief Justice Hughes once remarked, 'An unscrupulous administrator might be tempted to say 'Let me find the facts for the people of my country, and I care little who lays down the general principles.' That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards."

See also United States v. United States Gypsum Co., 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746; Perry v. Perry, 88 U. S. App. D. C. 337, 190 F. 2d 601; Dollar v. Land, 87 U. S. App. D. C. 214, 184 F. 2d 245, cert. denied 340 U. S. 884; American Broadcasting Co., Inc. v. Federal Communications Commission, 85 U. S. App. D. C. 343, 179 F. 2d 437.

A finding of fact is clearly erroneous if it is (1) unsupported

by substantial evidence, (2) contrary to the clear weight of the evidence, or (3) is induced by an erroneous view of the law. Michael del Balso, Inc. v. Carozza, 78 U. S. App. D. C. 56, 136 F. 2d 280; Policyholder's Nat. Life Ins. Co. v. Harding (C. C. A. 8, 1945), 147 F. 2d 851; Sears, Roebuck & Co. v. Talge (C. C. A. 8, 1944), 140 F. 2d 395. The Tax Court's Findings of fact in these cases do not meet the requirements specified and, as a consequence, the Tax Court's decisions are erroneous and should be reversed.

In addition to the clear error of the Tax Court in failing to make proper and adequate findings of fact, the Tax Court failed to "make separate findings of fact and conclusions of law" as specifically required by Section 3 of that Court's governing statute (Section 3 of Title IX of the District of Columbia Revenue Act of 1937, supra). Such a requirement is mandatory, and failure of the Tax Court to comply therewith is clearly reversible error. Barnett v. Barnett et al. (Court of Civil Appeals of Texas, 1936), 98 S. W. 2d 215.

Prior to the incumbency of the present Judge of the Tax Court the late Judge Lawrence Koenigsberger, who presided over that tribunal for several years prior to his death in 1951, complied with the statutory requirement and made separate findings of fact and conclusions of law, as the records in cases decided by him and filed in this Court for review will show. An example is the last case decided by Judge Koenigsberger, i. e., Washington Times-

Herald, Inc. v. District of Columbia, supra (No. 11,491, pages 6 to 8, inclusive, of the joint appendix).

The present Judge of the Tax Court, in failing to make separate findings of fact and conclusions of law as required by law, purports to act under a new rule, adopted November 12, 1952,^{6/} as follows:

"Rule 34. -- Findings of Fact and Conclusions of Law. -- In any proceeding before the Court the findings of fact may be either in numbered paragraphs or in narrative form; and the conclusions of law, either may be stated separately in numbered paragraphs or may be incorporated in the opinion of the Court."

Undoubtedly, the adoption of such rule was an attempt to give authority to the Tax Court for its present practice of making only findings of fact and then writing an opinion and entering a decision as was done in these cases (J. A. 68, 78, 83, 93).

The Tax Court is authorized only to "adopt and promulgate rules of procedure in matters for determination" by it.^{7/} Rule 34, supra, adopted November 12, 1952, is not a rule of procedure; it is an attempt to nullify plain and unambiguous statutory requirement designed to secure to the respective parties in tax cases orderly due process of law so that they may be adequately apprised of the specific findings of fact and the law and thus be enabled to present their grievances, if any, to this Court for review of the Tax Court's

⁶ Par. 13-835, DCCT (District of Columbia Tax Reports, published by Commerce Clearing House, Inc.).

⁷ Sec. 47-2408, D. C. Code, 1951.

decisions. A rule adopted either by an administrative agency or by a court must not contravene a statute, and any rule so adopted which conflicts with statutory provisions, as in these cases, is without force. Johnson v. Manhattan R. Co. 289 U.S. 479, 53 S. Ct. 721, 77 L. Ed. 1331; General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430, 53 S. Ct. 202, 77 L. Ed. 408; Steinmetz v. Allen, 192 U.S. 543, 565, 24 S. Ct. 416, 48 L. Ed. 555, 564. Rules of procedure should be designed to help, not hinder, the disposition of cases. Holland v. Capital Transit Co., 87 U.S. App. D. C. 48, 184 F. 2d 686, cert. denied 341 U.S. 954. And although such rules, when adopted pursuant to statutory authority, have the force and effect of law (Cf. Bradley v. Pace, 87 U.S. App. D. C. 11, 183 F. 2d 806), they are invalid when they conflict, as in these cases, with plain statutory provision. Johnson v. Manhattan R. Co., supra.

The Tax Court further erred in authorizing the respondents to take in New York City, New York, depositions for the purpose of use at the hearing of these cases. There is no statutory authority whatsoever for the taking of depositions in appeals to the Tax Court from the action of the assessing authority of the District of Columbia in District tax cases. The Tax Court, being a tribunal whose existence and powers depend entirely upon statutory authority, must confine its exercise of authority to that granted in its governing statute.

Depositions were unknown to the common law, and the right to take and use depositions is entirely dependent upon statutory provision. Hanks Dental Association v. International Tooth Crown Co., 194 U. S. 303, 24 S. Ct. 700, 48 L. Ed. 989; 16 Am. Jur., Depositions, 700, Sec. 3. In the Act of March 3, 1901, 31 Stat. 1189, ch. 854 (Sec. 49-301, D. C. Code, 1951), which enacted a code of law for the District of Columbia, Congress provided in Sec. 1 thereof that the common law, all British statutes in force in Maryland on February 27, 1801, all general acts of Congress not locally inapplicable to the District, and all acts of Congress by their terms applicable to the District shall remain in force, except insofar as the same are inconsistent with or replaced by some provision of that Code. In Sec. 26 of that Act (31 Stat. 1194), in specifying the authority of justices of the peace in the District, Congress provided specifically for the procurement of testimony of nonresident witnesses in cases before such justices by the issue of a commission to take written interrogatories and cross-interrogatories of such nonresident witnesses. This provision of law is now made applicable to the Municipal Court for the District of Columbia (Sec. 11-741, D. C. Code, 1951) but is not applicable to the Tax Court of the District. Furthermore, Congress found it necessary to provide by statute authority for the United States Board of Tax Appeals (now known as the United States Tax Court) to procure testimony by taking depositions, and for the payment of witness fees and expenses. This was done in

1939, the year before the Board of Tax Appeals for the District of Columbia (now known as the District of Columbia Tax Court) was created by Congress. Secs. 1114 and 1115, I. R. C. Again, when Congress enacted the Internal Revenue Code of 1954, Congress made the same statutory provision in respect of the United States Tax Court. Sec. 7456, I. R. C. (1954) provides in part:

"Sec. 7456. (a) In General. -- For the efficient administration of the functions vested in the Tax Court or any division thereof, any judge of the Tax Court * * * may examine witnesses and require, by subpoena ordered by the Tax Court or any division thereof and signed by the judge (or by the clerk of the Tax Court or by any other employee of the Tax Court when acting as deputy clerk)--

"(1) the attendance and testimony of witnesses * * * from any place in the United States at any designated place of hearing, or

"(2) the taking of a deposition before any designated individual competent to administer oaths under this title. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent."

Sec. 7457, I. R. C. (1954), relating to witness fees, provides in part:

"(a) Amount. -- Any witness summoned or whose deposition is taken under section 7456 shall receive the same fees and mileage as witnesses in courts of the United States.

"(1) Witnesses for Secretary or his delegate. -- In the case of witnesses for the Secretary or his delegate, such payments shall be made by the Secretary or his delegate out of moneys appropriated for the collection of internal revenue taxes, and may be made in advance.

"(2) Other witnesses. --In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Tax Court, by the party at whose instance the witness appears or the deposition is taken."

Congress has made no similar provision in respect of the District of Columbia Tax Court. The Tax Court attempted to justify its unauthorized exercise of authority in permitting the depositions in question to be taken and used under Rule 29 of its rules of procedure which provides for the taking and use of depositions in accordance with rules relating thereto in force in the United States District Court for the District of Columbia "insofar as such rules are applicable." (J. A. 63.) The answer to this, of course, is that the rules of the United States District Court for the District of Columbia are not applicable and cannot be made applicable without proper statutory authority on the matter of taking and using depositions. Congress has made no provision for the payment of witness fees and mileage of nonresident witnesses and others, and no rule of procedure promulgated by the Tax Court can lawfully supply this lack of authority or appropriate funds from the public revenues for the payment of nonresident witness fees and other expenses. Furthermore, although the United States Tax Court has authority to compel the attendance of witnesses and take depositions "from any place in the United States" (Sec. 7456(a)(1), I. R. C., 1954), the District of Columbia Tax Court does not have such

authority and it could not compel the attendance of nonresident witnesses at the place of taking a deposition outside the District of Columbia.

Failure of the Tax Court to comply with plain statutory requirements in respect of its proceedings and determinations, in the making of erroneous findings of fact, in not making conclusions of law, in exceeding its authority by permitting depositions of nonresident witnesses to be taken outside the District of Columbia and to be used in the hearing before it, and in entering decisions in these cases without such compliance, clearly deprives the District of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States and, consequently, such decisions should be reversed.

CONCLUSION

It is respectfully submitted that the decisions of the Tax Court should be reversed.

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APPENDIX TO PETITIONER'S BRIEF

Contract dated February 9, 1932 between the
Tribune Co. and The Washington Post Co.
which was involved in the case of Myers v.
Washington Times Co., 64 App. D.C. 213,
76 F. 2d 988.

EXHIBIT 1.

Memorandum of agreement entered into between the Tribune
Company, an Illinois corporation, hereinafter called the
"Publisher" and the undersigned corporation, firm or individual,
hereinafter called the "Subscriber."

Witnesseth: For and in consideration of the sum of \$1.00 by
each of the parties hereto to the other in hand paid, receipt
whereof is acknowledged, each of the parties hereto covenants
and agrees with the other as follows:

First: The Publisher will furnish each week to the Subscriber
in proof or matrix form and the Subscriber will accept and
regularly publish the following newspaper features, viz.:

Gumps Daily and Sunday	at \$	_____	per week:
Gasoline Alley Daily and Sunday	at \$	_____	per week:
Winnie Winkle Daily and Sunday	at \$	_____	per week:
Dr. Evans	at \$	440	per week:
Pegler Daily and Sunday	at \$	_____	per week:
_____	at \$	_____	per week:
_____	at \$	_____	per week:
Dick Tracy	440		
	150		
	<u>290</u>		

for the term of 5 years beginning on the 14th day of Feby 1932

and thereafter until either party has given to the other ninety (90) days' notice in writing of its election to terminate this contract; said notice may be given ninety days prior to the end of the above described term, or at any time thereafter, but shall not affect a termination of the contract until the expiration of ninety days after the giving of said notice. In the event that, for any reason, the Publisher shall be unable to furnish to the Subscriber one or more of the above described features, there shall be deducted from the amount which the Subscriber herein agrees to pay to the Publisher, the amount hereinabove set opposite the above description of such feature or features not furnished, respectively, for each week that the said Publisher shall fail to furnish said feature or features, respectively, and in such event the Publisher shall endeavor, but shall not be obliged, to furnish other matter to the Subscriber in place of such feature or features as it is unable to furnish, at a price or prices hereinafter to be agreed upon by the parties hereto:

Second: The Subscriber shall pay to the Publisher for the aforesaid service throughout the term of this agreement at the weekly rate or sum of Four Hundred and forty dollars (\$440.00), all sums accruing in any one month to be due and payable on

or before the 15th of the month following:

Third: The Subscriber will not use, or cause or allow to be used, any feature or features furnished to it hereunder, except for one publication of each item thereof in its said newspaper, nor will it give or sell to any person, firm or corporation any of the matter furnished to it by the Publisher hereunder, or any rights of any nature therein, without first obtaining in each instance the written consent of the Publisher. The termination of this agreement shall end and terminate all the Subscriber's rights to any use whatsoever of any and all matter delivered to it hereunder.

Fourth: The Subscriber further agrees that it will cause to be printed in connection with all of the copyrighted or trade-marked matter published by it under this agreement, a copyright and trade-mark notice in the form required by the statute, giving the name of the person or corporation in whose name the copyright of such matter has been obtained.

Fifth: The Subscriber covenants and agrees that it will not publish or cause or allow to be published any of the aforesaid matter in advance of the respective release dates therefor set by the Publisher.

Sixth: This agreement shall not be binding until it shall have been accepted at the City of Chicago by the Publisher by its Managing Editor, Business Manager, or Syndicate Manager, and such acceptance shall have been noted thereon.

Seventh: The printed and written provisions hereof constitute the whole agreement between the parties hereto and no oral modifications thereof or additions thereto shall be binding upon said parties.

In witness whereof the parties hereto have hereunto set their hands the 9th day of Feb. 1932.

(Sgd.)

By

TRIBUNE COMPANY
ARTHUR W. CRAWFORD.
WASHINGTON POST COMPANY

(Sgd.)

By

IRA BENNETT.

Accepted, Chicago, Feb. 9, 1932.

TRIBUNE COMPANY,

By

Managing Editor.

	440.00	
Less Graphic Weekly	150.00	discontinued
	<u>290.00</u>	
Dick Tracy Sunday	15.00	
	<u>305.00</u>	

